



NJ Med Mal: Another Strikeout?

By Brian S. Kern, Esq. (12/07)

The NJ medical malpractice insurance market, though still expensive by comparison to most states, has seen some significant improvement over the past couple of years. More companies are offering medical liability coverage, leading to an increase in competition, and, often, lower premiums. While the short-term relief is much needed for physicians, three disturbing issues are emerging, and may be setting up a whole new crisis if not addressed.

Strike one was thrown by a task force created under Bill A-50, "The New Jersey Medical Care Access and Responsibility and Patients First Act," when it recently issued its report on the medical malpractice insurance crisis (for a detailed analysis, go to www.insuranceagent.com). The report concluded that the NJ medical malpractice market is not experiencing a crisis, and any unusually high premiums were the product of an irresponsible insurance industry. According to the report, "We are now witnessing the wholesale collapse of insurance rates, including medical malpractice rates," and "This had nothing to do with tort law restrictions enacted in particular states, but rather to modulations in the insurance cycle everywhere."

While it is true that the medical malpractice insurance market is enjoying a national recovery, some states are doing much better than others. Attribution can be placed on many factors, including: various tort reform measures enacted on a state-by-state basis; a wave of new companies formed across the country to capitalize on a market faced with too much demand and too little supply; and a substantial increase of premiums. A leveling of claim frequency, increased competition, and rate inflation has put this ailing market into remission, but a reversal of recent fortunes may lead to an unwelcome and expensive relapse.

Fears that the task force report would be used as a catalyst to block any renewed efforts at tort reform have been confirmed. Worse, rather than moving toward lowering liability, the legislature is about to make a major change in the tort laws, which may increase the cost of malpractice insurance, and subject physicians to many more lawsuits.

This second strike at physicians is Senate Bill 176, which would make drastic changes to New Jersey's existing wrongful death statute. Under current law, parents, children and spouses of a decedent have no separate cause of action for their own grief or loss resulting from the death of their loved ones. Recovery is not only limited to beneficiaries, but also limited to pecuniary, or "economic" loss. As a result, there is often

insufficient provable economic loss to make a wrongful death medical malpractice case cost effective to plaintiffs.

Under the revised bill, spouses, children, siblings and parents can all obtain a separate recovery for noneconomic damages for loss of society, companionship, comfort, protection, marital care, parental care, filial care, attend, advice, counsel, training, guidance or education, where applicable. The bill provides:

Loss of the special relationship between and among spouses, parents, children and siblings shall form a basis for the award of damages recoverable hereunder. Loss of such relationship may include consideration of mental anguish and emotional pain and suffering only in the case of a surviving spouse, child, father or mother, or persons standing in loco parentis to the deceased person or to whom the deceased stood in loco parentis at the time of the injury which caused the death of the deceased or in the alternative surviving brothers and sisters.”

If the Bill passes – and passage in the lame duck session of the legislature seems likely, the frequency and severity of claims will almost assuredly increase dramatically.

Indeed, the major medical malpractice insurance carriers have acknowledged that this bill will have a negative impact on premiums, the true cost of which will be unknown until the increased number of claims and the increase in payouts is ultimately realized.

If the increase is as great as some fear, carriers will be forced to reevaluate surplus and reserve levels, and upwardly adjust premiums accordingly.

Strike three will be pitched by MIIX Insurance Company’s relief pitcher, its NJ State Rehabilitator. Based on reports obtained from physicians formerly insured by MIIX, the company may be readying an announcement of its insolvency early in 2008. That will leave those physicians covered by MIIX with only the \$300,000 limit provided under the State Guarantee Fund, and personally liable for any excess. While physicians are expressing concern over having to foot the bill in one form or another for this debacle, companies are trying to determine how to best prepare for this eventuality from both a claim and underwriting perspective.

Temporary relief in the medical liability marketplace should not be confused with long-term improvements, and complacency now could be tragic. Strong action is needed before all these fastballs being thrown at physicians produce another strikeout.

Authors Note: The Wrongful Death Bill was “pocket vetoed” by Governor Corzine, and, thus, has not been adopted.