IADC COMMITTEE NEWSLETTER

# MEDICAL DEFENSE AND HEALTH LAW

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## IN THIS ISSUE

*Arkansas' upcoming tort reform is a new challenge that medical malpractice attorneys must consider from both sides before casting a vote. Read a little from both sides, and then decide how it affects your clients and your business.*

# What's in a Name?
# Everything for Looming Arkansas Tort Reform

## ABOUT THE AUTHORS

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## ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee recently added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article contact:

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This year, Arkansas came one step closer to voting on tort reform that could have a significant impact on medical malpractice lawyers on both sides of the courtroom. "An Amendment to Limit Attorney Contingency Fees and Non-Economic Damages in Medical Lawsuits" (Issue 4) appeared on the November 8, 2016 ballot in Arkansas, but the Arkansas Supreme Court instructed any votes on the amendment be neither counted nor certified.[1] The Court took issue with the inclusion of the phrase "non-economic" damages in the title.[2] The Court found that the inclusion of the term could impact a voter's understanding of the proposed amendment because it is a technical term that is not readily understood by voters.[3] This finding is significant because a majority of voters derive information about the content of legislation from a review of the amendment title as it appears on the ballot. Clever legislators are likely to revise the title of the amendment in time for the next election cycle.

I. What did the amendment propose?

The proposed amendment (as aptly named if you *are* an "expert in the legal field") included two material changes to the body of law governing medical malpractice claims in Arkansas. First, it limited the amount that plaintiffs' attorneys could collect in legal fees – up to 1/3 of any damage award, after expenses. Second, it limited non-economic damages to $250,000.

II. Do other states have caps?

Yes, and the damage caps have had a significant impact on the medical malpractice legal practice. For example, Texas implemented tort reform in 2003. The Texas statute caps non-economic damages at $250,000 for physicians or providers and a $250,000 per-facility cap (ex: hospitals and nursing homes) with an overall cap of $500,000 against health care facilities creating an overall limit of non-economic damages in medical malpractice cases.[4]

In 2013 (on the 10 year anniversary of tort reform), Texas ranked 50th in the amount paid for malpractice claims against all providers per capita. Medical malpractice claims, including lawsuits, fell by nearly 2/3 between 2003-2011, and the average payout declined 22%. The amount of doctors in Texas increased two-fold, and malpractice insurance costs decreased by half.

III. What affect will this have on medical malpractice litigation in Arkansas, and how could that effect my practice?

The impact of the proposed legislation extends beyond the plaintiff's bar, and could cause unanticipated challenges for defense attorneys who specialize in medical malpractice. On one hand, the proposed legislation appears to be advantageous for their healthcare provider clients. On the other hand, as we saw in Texas, limiting the damage awards could directly impact the number of

[1] *Wilson v. Martin*, 2016 Ark. 334 (October 13, 2016).
[2] *Id*. at **9-10.
[3] *Id*.
[4] See TEX. CIV. PRAC. & REM. CODE § 74.301.

claims filed and the values of those claims. Any change in the number of cases filed also directly impacts defense attorneys– especially those who have medical defense practices. A number of these defense attorneys could find themselves with less work and little experience in other fields.

While the legislation would likely benefit the healthcare providers who are sued, it is likely that less suits will be filed against providers. That means there will be less need for claims representatives, and the possibility that some carriers may pull out of the state because they simply do not want to keep an office open with only a handful of employees or write only a few policies in a particular state. In fact, if a state has several carriers, there is a likelihood that some carriers may pull out of the state because they simply do not want to keep an office open with only a handful of employees or write only a few policies in a particular state. Less carriers = less competition, which can result in higher premiums (even if they are still lower due to caps).

We reached out to Arkansas attorneys who specialize in medical malpractice to get their perspectives.

One of the drafters of the legislation, Daniel Greenberg who is the president of the Advance Arkansas Institute summed it up:

> Caps on objectively measurable-in-dollars damages (loss of income, loss of property) cannot be justified, but that there is a persuasive case for caps that eliminate extreme results in damage verdicts for damages that cannot be measured objectively in dollars (also known as "non-economic damages"), such as damages for pain and suffering. There is a danger that such verdicts will be both erratic and excessive; I think that juries often receive inadequate guidance on appropriate size of verdicts in such cases. Research suggests that capping such damages can reduce the use of unnecessary defensive medicine and encourage more medical professionals to migrate to a state marketplace where their work is better protected (leading to more competition among providers and greater patient satisfaction). Some sort of offer-of-settlement system, which rewards litigants for reasonable settlement offers, would probably be a superior tort reform alternative, but non-economic damage caps are probably more easily understood by policymakers.

David Blair is a well-known and respected plaintiffs' lawyer who handles a significant amount of medical malpractice. His take on the tort reform:

> Tort reform in the context of medical negligence cases is, in Arkansas, a quintessential example of a solution seeking a problem. By Act 649 of Acts of 2003, venue was localized to the situs of the negligent act omission, joint and severally liability was, for the most part, abolished and by rule making the Supreme Court has given all defendants,

> not just medical, a convenient scape goat in the form of non-party allocation of fault. Short of abolishing all liability for injuries proximately caused by medical negligence, there is not much left to "reform." From casual conversations with both defendants' and plaintiffs' attorneys, it appears that the number of filings is way down in recent times, and some firms have down-sized their medical defense section. So one might well ask, "What's the beef?"

Likewise, Denise Hoggard, president of the Arkansas Bar Association and respected plaintiffs' lawyer, stated:

> When you are injured because someone breaks the rules, you want a jury to decide what is right. We trust Arkansas juries to set damages on the value of human life wrongfully taken. We already have rules against frivolous lawsuits. Issue 4 takes Arkansan's rights without solving any problem. Issue 4 unlevels the playing field for everyone and that is why the Arkansas Bar Association opposes it. The American Bar Association has studied this nation-wide and agrees that in states adopting caps, it unlevels the playing field. The Center for Democracy and Justice study finds capping damages hurts the delivery of medical care.

## IV. Conclusion

In sum, Arkansas is likely to enact tort reform relatively shortly. Will your state be next? There are hard questions to answer on both sides of the Bar when considering the effects of such legislation, and medical malpractice defense attorneys should take a close look at the language of the proposed legislation and all of the issues if and when such a vote comes to visit your state.

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