

MEDICAL DEFENSE AND HEALTH LAW

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IN THIS ISSUE

Robert G. Smith outlines proposed federal legislation that would establish restrictions on health care lawsuits where coverage for the health care was provided or subsidized by the federal government.

The US House Passed the Protecting Access to Care Act of 2017 on June 28, 2017

ABOUT THE AUTHOR



Robert G. Smith is a member/owner of the firm Lorance & Thompson, PC in Houston, Texas. Rob is a member of the Product Liability; Business Litigation; Cyber Security, Data Privacy and Technology; and Medical Defense & Health Law Committees of the International Association of Defense Counsel. Rob's clients include health care providers, manufacturers, and many types of corporations. He has tried a wide variety of cases during his 20 years of practice. He can be reached at rgs@lorancethompson.com.

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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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

The U.S. House of Representatives passed H.R. 1215 on June 28, 2017 by a vote of 218-210. This bill would establish provisions governing health care lawsuits where coverage for the care was provided or subsidized by the federal government.

The bill would establish a statute of limitations three years after the occurrence of the breach or tort, three years after the medical care that is the subject of the claim is completed, or one year after the claimant using reasonable diligence discovers the injury, whichever occurs first. For minors under the age of six, the statute of limitations would be the later of three years after the occurrence or medical care at issue, one year after discovery of the injury, or the minor's eighth birthday.

Noneconomic damages would be limited to \$250,000 regardless of the number of parties against whom the action is brought or the number of separate claims or actions brought with respect to the same injury. Juries may not be informed of this limitation. Future noneconomic damages would not be discounted to present value.

Parties would be liable only for damages directly proportional to their responsibility. Joint and several liability would not apply.

This statute would not preempt any State law effective before or after the federal statute that specified particular amounts of economic or noneconomic damages that may be awarded in a health care lawsuit, whether the State limits are greater or lesser than the federal statute.

The court would have the power to restrict the payment of any damage recovery to the claimant's attorney "based upon the interests of justice and principles of equity," but in no event shall the total of all contingent fees exceed:

- (1) Forty percent of the first \$50,000 recovered by the claimant(s).
- (2) Thirty-three and one-third percent of the next \$50,000 recovered by the claimant(s).
- (3) Twenty-five percent of the next \$500,000 recovered by the claimant(s).
- (4) Fifteen percent of any amount by which the recovery by the claimant(s) is in excess of \$600,000.

These limitations apply to all recoveries, whether by judgment, settlement, or arbitration. State statutes that are more restrictive would not be preempted.

Evidence of collateral source benefits such as insurance payments could be introduced in personal injury or wrongful death lawsuits, and providers of such collateral source benefits would not be allowed to recover any amount from the claimant. However, this restriction would not apply where Medicare is the secondary payer or there is third party liability for Medicaid services.

At the request of any party, future damage awards of \$50,000 or more would be paid in periodic payments.

A health care provider who prescribes or who dispenses pursuant to a prescription, a medical product approved, licensed, or cleared by the Food and Drug Administration could not be named as a party to a product liability lawsuit involving such product and could not be liable to a claimant in a class action lawsuit against the manufacturer, distributor, or seller of such product.

An expert witness could not offer testimony regarding the standard of care or causation unless the person was licensed to practice in the State or a contiguous bordering State, a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one of these States during the year preceding the date that the alleged injury or wrongful act occurred.

An affidavit of merit signed by a qualified expert witness would be required to be filed with the original lawsuit, outlining the applicable standard of care, how the standard of care was breached and what should have been done to have complied with the standard, and how the alleged breach caused the injury.

Before filing a health care lawsuit, a person must give the health care provider 90 days written notice, unless within six months of the statute of limitations.

This proposed legislation would significantly alter the law applicable to medical malpractice cases in many State. We will see what happens in the Senate.

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