On December 1, 2010, The National Commission on Fiscal Responsibility and Reform held its sixth public meeting to discuss the nation’s fiscal challenges. At the meeting, the Commission released its final report, *The Moment of Truth: Report of the National Commission on Fiscal Responsibility and Reform*. The report sets forth recommendations for proposed changes that will serve to balance the federal budget - including recommended changes to contain health care costs. In an effort to reduce health care costs, the Commission has recommended reforming our medical liability system. The proposed nationwide medical liability reform – against the backdrop of Ohio’s tort reform - is the subject of this article.

According to the Commission, federal health care spending represents the single largest fiscal challenge over the long-run. As the baby boomers retire and overall health care costs continue to grow faster than the economy, federal health spending threatens to balloon. Under current systems, CBO projects that federal health care spending for Medicare, Medicaid, the Children’s Health Insurance Program (CHIP), and the health insurance exchange subsidies will grow from nearly 6 percent of GDP in 2010 to about 10 percent in 2035, and continue to grow thereafter.

The Commission claims that the current tort system in the United States leads to an increase in health care costs. This is true both because of direct costs – higher malpractice insurance premiums – and indirect costs in the form of over-utilization of diagnostic and related services (i.e. performing tests that are not medically necessary simply to protect against the risk of tort liability). To combat these costs within the system, the Commission recommends an aggressive set of reforms to the tort system.

Among the changes specifically recommended are: 1) modifying the “collateral source” rule to allow outside sources of income collected as a result of an injury to be considered in deciding awards; 2) imposing a statue of limitations of 1 to 3 years on all medical malpractice lawsuits; 3) replacing joint-and-several liability with a fair-share rule, under which a defendant in a lawsuit would be liable only for the percentage of the final award that was equal to his or her share of responsibility for the injury; 4) creating specialized “health courts” for medical malpractice lawsuits; and, 5) allowing “safe haven” rules for providers who follow best practices of care. Further, select members of the Commission, also recommended statutory caps on punitive and non-economic damages.

It is important to note that changes similar to those recommended by the Commission have already been adopted into Ohio law. Ohio’s tort reform, and corresponding case law, has already provided for: 1) the introduction of evidence of dollar amounts “written-off” from medical bills; 2) the submission of a physician’s affidavit of merit to be provided in support of each medical malpractice lawsuit filed; and 3) the placement of caps on non-economic damages and punitive damages.

While these changes have been significant, Ohio’s tort reform legislation is not nearly as dramatic and/or extensive as the entirety of the suggested plan set forth by the Commission for nationwide change.

What will be the impact of the proposed nationwide medical malpractice tort reform? To answer this question one might begin by analyzing the impact that Ohio’s tort reform legislation has had both locally in Cuyahoga County and statewide. Since medical malpractice and other tort reform legislation took effect in Ohio in 2003, its impact has been felt considerably, starting particularly in 2005 and through the present. In Cuyahoga County, medical malpractice case filings have decreased from 411 in 2005, to just 255 in 2010. Similarly, medical malpractice filings are down throughout Ohio. While the Ohio Department of Insurance has not yet released statistics pertinent to the last two years, it is reported that medical malpractice cases decreased from 5,051 filings in 2005, to just 3,080 filings in 2008.

What is the likely success of implementing nationwide tort reform? To put this into perspective, we can weigh the successes and failures of various states that have already attempted reform. For example, in Ohio, Courts have authored mixed opinions concerning the constitutionality of tort reform. Some lower courts have indeed held that the application of damage caps is unconstitutional. See *e.g.* *Wells v. Call*, D.O., Summit County, Case No. CV 2008-09-6782, decided Nov. 23, 2010. However, tort reform has generally been upheld by the Ohio Supreme Court in *Arbino v. Johnson & Johnson* (2007), 116 Ohio St.3d 468.
With that said, some states have more uniformly embraced tort reform. For example, Indiana became the first state in the nation to enact comprehensive malpractice reform in 1975. In fact, Indiana has had broad reform that includes a form of the so-called “health courts,” as recommended by the Commission to be applied nationwide. According to the Indiana State Medical Association, changes to Indiana’s system have led to lower medical insurance premiums and better access to patient care.

In contrast, some state Supreme Courts have recently ruled to strike down medical malpractice tort reform. In *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt* (2010), 286 Ga. 731, the Georgia Supreme Court found that capping jury awarded non-economic damages in a medical malpractice case was unconstitutional. Similarly, in *Lebron v. Gottlieb Memorial Hospital* (2010), 237 Ill. 2d 217, the Illinois Supreme Court also held that limiting a jury’s verdict as it relates to non-economic damages was unconstitutional and arbitrary.

As the foregoing demonstrates, both strong support and opposition to medical malpractice tort reform exists in the various states. While there may be disagreement among the states relative to enacting and embracing reform, our federal government appears to favor nationwide reform. We cannot predict the future with certainty, but we can look to the recent bi-partisan report of The National Commission on Fiscal Responsibility and Reform to conclude that there will undoubtedly be a strong force from the federal government to continue to pass further tort reform legislation in an effort to reduce the cost of patient care.

If you have any questions regarding this report, please feel free to contact one of our Medical Malpractice or Health Care Group Members.

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