

Memorandum in OPPOSITION

NYSBA #2

February 23, 2011

Issue: Medicaid Redesign Team Proposal Number 131

The Committee on the Tort System of the New York State Bar Association OPPOSES the Medicaid Redesign Team's Proposal Number 131

Introduction

The Committee on the Tort System unanimously opposes the Medicaid Redesign Team's (MRT) Proposal Number 131, which aims to create a Neurologically Impaired Infant Medical Indemnity Fund (Fund) and would institute a cap on non-economic damages for medical malpractice awards. It has long been the policy of this Association that such caps would be inadvisable.

With respect to the Fund, the Committee is gravely concerned that the proposal would bring about profound and far-reaching changes to the civil justice system. The proposal has not been sufficiently studied, nor has it had the benefit of full and fair review by all interested parties. While the MRT projects a state savings in the Medicaid program, we are concerned about how the Fund would be capitalized and administered. We are also concerned that the potential long-term expenses of creating the Fund are unknown and would likely be costly.

More importantly, we are concerned that establishing such a program without input from interested parties will abridge several rights that New Yorkers currently enjoy. For example, the right to access the civil justice system, and more specifically the right to a trial by jury. The Committee questions the relationship between Medicaid reform and malpractice reform, whether malpractice reform is needed and/or advisable, and whether Proposal Number 131 would accomplish its stated purpose. Lastly, the Committee urges the consideration of measures to enhance patient safety and prevent adverse medical outcomes as a proper topic in any proposed reforms.

Background on the MRT process

During his State of the State address on January 5, 2011 Governor Andrew Cuomo said that, "[w]e need to redesign the Medicaid program." Consequently, the Governor created a MRT, to "find efficiencies in the program so we actually provide a better service for less money." The MRT was said to include "stakeholders," who would re-invent the program as part of the 2011-12 state budget due to be in place by April 1.

The MRT web site sets forth the following mission statement:

The Medicaid Redesign Team has been tasked by Governor Cuomo to find ways to reduce costs and increase quality and efficiency in the Medicaid program for the upcoming 2011-12 Fiscal Year. As part of its work, the Team is seeking ideas from the public at large, as well as experts in health care delivery and insurance, the health care workforce, economics, business, consumer rights and other relevant areas.

New York Medicaid spends more than \$53 billion annually to provide health care to more than 4.7 million people in need. In effect, Medicaid is the largest health insurance program in New York State. The costs are borne by state, county and federal taxpayers. The Team will undertake the most comprehensive examination of New York Medicaid since its inception. The Team must submit its first report with findings and recommendations to the Governor by March 1 for consideration in the budget process, and shall submit quarterly reports thereafter until the end of Fiscal Year 2011-12, when it will disband.

As part of its collaborative approach, the Team wants to hear reform ideas, big and small, from health care professionals, administrators, stakeholders, and the general public through regional public hearings and an online survey. As ideas are collected, the Medicaid Redesign Team will evaluate the ideas and approve a final package to be reviewed and approved by the Governor and the Legislature.

On February 9, 2011, Medicaid Director Jason Helgerson presented an update during the MRT meeting in New York City. During his presentation Mr. Helgerson highlighted arguments to support the proposition that “malpractice reform is Medicaid reform.” In particular, the presentation focused on a proposal promoted by the Greater New York Hospital Association. Proposal Number 131 would recommend changes to the civil justice system—capping non-economic damages at \$250,000 and establishing a Neurologically Impaired Infant Medical Indemnity Fund. The proposal claims that it would save Medicaid around \$234 million, with a total savings of about \$469 million. It is not clear how these savings were calculated.

The proposal also included the following additional “modest” reforms:

- allow peer review privileges to be extended to defendants;
- early pre-trial showing of each defendant’s involvement in the case;
- some protection of statements of remorse and acceptance of responsibility; and,
- require a 182-day pre-suit notice period.

As of February 14, this proposal is now one of forty-nine proposals that have moved to the next stage of the process and will be considered as the MRT formulates its final recommendation.

Discussion and Recommendations

The New York State Bar Association has a long-standing position in opposition to caps on non-economic damages in medical malpractice or any other tort action. The Association's position is summarized as follows:

- The purpose of our tort system is to make whole or compensate the victims of harm caused by the negligence by others;
- In addition to out-of-pocket economic damages -- such as lost wages -- our system provides that a victim may be compensated for pain and suffering that results from serious injury. To cap this type of compensation would unjustly discriminate against accident victims who suffer the most devastating physical and psychological losses;
- Considering only economic loss would discriminate against persons with little or no earnings such as homemakers, children and retirees;
- Awards for non-economic injuries serve to deter corporate and governmental misconduct and to protect innocent citizens. A cap would eliminate the deterrence. Victims and society would then have to subsidize the cost of high-risk activities.

It appears that the MRT's deliberations have not considered arguments that recognize the value and the benefits of the civil justice system to all patients in the healthcare system and society in general. One insurance expert wrote that, "malpractice lawsuits promote patient safety both through visible public policy efforts and through less visible changes in hospitals and other healthcare organizations. In the realm of public policy, malpractice lawsuits and the research they have spawned have turned patient safety into a public health concern."¹ Another study found that "the major safety-related reasons for which hospitals have been successfully sued are inadequate nursing staff and inadequate facilities." The author concluded that, "the goal is the prevention of injury, and focusing on litigation provides a strong incentive for hospitals to make their environments safer."²

¹ Baker, T., *The Medical Malpractice Myth*, page 98.

² Annas, G., *The Patients Right to Safety – Improving the Quality of Care through Litigation against Hospitals*, New England Journal of Medicine, May 11, 2006.

In the interest of full and fair debate on this important public policy issue, such views should be heard and seriously considered as part of the policy-making process. However, given the fact that many interested parties are absent from the membership of the MRT, such analysis and arguments are conspicuous by their absence from the proposal.

Some in the medical industry have long complained about the perceived explosion in malpractice actions to justify their prescription for "reform." However, case filing numbers for the last 20 years have remained relatively flat. In 2009 (the most recent year for which the Office of Court Administration has complete information to report) filings were at the lowest level since the early 1990's. In 1993 there were 3,976 filings. In 2009 there were 3,961 filings.

As Proposal Number 131 comes to light in this accelerated policy-development process, objections are now appearing. *The New York Times* editorial of February 19 urged the MRT "to forget caps" on non-economic damages. Nevertheless, it is unsettling that the MRT seeks to reduce state Medicaid expenditures by enacting significant changes to the civil justice system, namely changes focused on the rights of individuals injured by medical malpractice. We submit that review and redesign of the Medicaid system should be conducted separate and apart from review and analysis of medical malpractice, similar to the operation of the state's Medical Malpractice Task Force established by Governor Spitzer in 2007. The process in 2007 included a truly credible array of stakeholders regarding medical malpractice -- hospitals, physicians, lawyers, academics, public officials, consumers. The Medical Malpractice Task Force was correct in not focusing on the Medicaid system. The MRT should not now focus on medical malpractice.

The MRT has said that all members of the public and interested groups have been invited to attend and give feedback during its process. While this is admirable, the reality of the process is that the MRT is considering broad changes to the civil justice system, while excluding from the decision making team those groups most knowledgeable about that system. This is unsettling and unfair.

Conclusion

With no representatives of the civil justice system, and few, if any, representatives of patient safety organizations, the public may question the credibility of the Medicaid Redesign Team's Proposal Number 131. Caps are an anathema with respect to equal protection/access to justice, and the procedure being implemented seeks to disenfranchise interested parties and perhaps grievously injured victims.

Based on the recommendations of the Committee on the Tort System, the Executive Committee of the New York State Bar Association remains opposed to caps on non-economic damages in tort and medical malpractice actions. Moreover, the Association opposes modifications to the civil justice system if such modifications are proposed without the balanced representation and input of all stakeholders. If the MRT includes Proposal Number 131 among its final recommendations, the Governor and the Legislature should reject it.