

YOUR PROFESSIONAL LIABILITY BROKER,



is pleased to be sending you, our *Cornerstone Quarterly Newsletter*.

Many of your colleagues may be in need of our assistance. Please have them give us a call at 800-508-1355.

Thank you,
Chris Zuccarini
President



PROFESSIONAL LIABILITY CONSULTANTS

A QUARTERLY NEWSLETTER

INSURANCE REGULATION, NOT CAPS IN NEW CONNECTICUT MEDMAL LAW

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The Connecticut legislature recently passes a bill that contained as many provisions regulating medical liability insurers as it did tort reforms. At press time Gov. M. Jodi Rell had not said whether she would sign it.

The bill requires that insurers obtain prior approval for rate increases of 7.5% or more. Insurers would also have to notify policy holders 60 days in advance of the proposed increase and inform them of their right to request a hearing by the state insurance department.

The law also requires insurers to report closed claims to the insurance commissioner with identifying information including the insurer, physician and amount paid on the claim.

It also requires a report by October 1, 2008 from the insurance commissioner on whether insurance rates reflect the cost of writing business in the state. If rates haven't decreased, a committee to recommend how to cut rates is to be established.

The insurance provision reflects doctors' outrage at an 89.6% increase by Medical Protective last year.

Although the law does not contain a cap on noneconomic damages in medmal suits, it requires the trial court review noneconomic damages of more than \$1 million and reduce an award if the court finds it "shocks the sense of justice."

Former governor John G. Rowland vetoed tort reform legislation last year because it didn't contain caps.

Other provisions include:

- Strengthening the suite certification requirement so that certificates are signed by physicians practicing in the same specialty as the one sued
- Allowing collateral sources of awards or damages already recovered to be entered into evidence.
- An "apology" provision prohibiting a physician's expressions of sympathy or condolence from being used in the subsequent lawsuit
- Physicians also got a chance of settling a lawsuit without judgment against them under an "offer of compromise" provision. It changes the statutory procedure so that physicians would be withdrawn from the lawsuit upon settling instead of having the judgment entered against them as the previous "offer of judgment" required.
- The state medical association claimed victory in removing several objectionable sections of the bill and took heart that legislators didn't say the new law would fix the medical liability insurance crisis in the state.
- Another bill passed by the legislature would require any medmal insurer that leaves the state to provide "tail" coverage to physicians over 55 who have been insured by the company for seven years, regardless of whether the physicians retires or continues to practice.

CORNERSTONE CUSTOMER SATISFACTION SURVEY

Thanks to all of you who faxed the surveys back. We truly appreciate it!!!

We received more than 100 survey's back and based on yours answers we are providing the service to our clients that we strive for.

Thank again from the Cornerstone Team!!

THE HENRY J. KAISER FAMILY
FOUNDATION HAS ADDED MEDICAL
MALPRACTICE TO ITS WEBSITE:
statehealthfacts.org

Here are some highlights from the site
PLEASE NOTE THAT THE INFORMATION IS
FROM 2003

TOTAL DOLLARS IN PAID CLAIMS / AVERAGE CLAIM PAYMENT

United States	\$4,452,127,250 / \$291,236
Connecticut	\$104,653,250 / \$486,759
Massachusetts	\$101,860,250 / \$407,441
New Jersey	\$188,599,100 / \$322,392
Pennsylvania	\$381,824,550 / \$305,704

TOTAL NUMBER OF CLAIMS / NUMBER OF CLAIMS PER 1,000 ACTIVE PHYSICIANS

United States	15,287 / 18.8
Connecticut	215 / 16.8
Massachusetts	250 / 8.8
New Jersey	585 / 20.1
Pennsylvania	1,249 / 30.2

BOOK HELPS DOCTORS NAVIGATE LAWSUITS' PERSONAL AND PROFESSIONAL STRESS

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Sara Charles, MD knows that lawsuits test the personal character and professional skills of those accused.

The retired psychiatrist and medical school professor was sued for medical malpractice 30 years ago and the experience not only changed her as a person, it opened up a new field of research and set her on a course of helping other doctors going through the same experience.

Paul R. Frisch, JD, also knows medical. For 30 years he has been helping physicians as a defense attorney and for the last 20 years as general counsel for the Oregon Medical Association, where he heads up its sponsored medical liability insurance program.

For many years the two have worked together researching the way physicians are affected by lawsuits. Now they have teamed up to write a new book that promises to help doctors and others understand and navigate the legal system while honoring their own ideals and emerge changed, but stronger, from the experience.

Adverse Events, Stress and Litigation, just out from Oxford University Press, is a comprehensive guide to litigation. But unlike other books on the subject, it emphasizes the psychological effects of the experience and offers tips on coping with the stress lawsuits bring. It modernizes the discussion, putting in context public demands for disclosure and apology that physicians increasingly face.

The message Charles hopes physicians will come away with is that being sued is a form of trauma and "an intensely human experience," she said during a recent interview. "We must stir ourselves to take on the main challenges: litigation trauma brings, the authors say. Taming litigation's dehumanizing experience is done by making it as human as possible, Charles said.

Physicians must reject victim status as they aggressively take on two challenges: informing themselves about the law and defending their integrity. They must demand legal representatives who are competent, experienced and fully committed, the authors recommend. "Experience teaches that those who take an active role in their defense are far more satisfied than those who accept passively being overwhelmed and victimized," they say. The book gives examples of things physicians can do at every step along the way. Physicians need to respond as a human would respond. "When you go through a trauma you need to talk about it to someone you trust who understands how you are feeling," Charles said. The authors recommend talking about feelings, not the details of the suit, to a spouse, colleague or helping professional. But they are aware that their advice might be contrary to recommendations of attorneys and insurance companies. "Some insurers still tell physicians not to talk about their suits. While this may be good legal advice, it is very bad psychological advice. You need to talk about how you feel to relieve the stress," Charles said. "When public and the patient safety movement are demanding that physicians disclose and apologize, it is unfair and damaging to require physicians to hold inside their own feelings about an adverse event," Frisch said.

Frisch's expertise is evident in the sections explaining the legal setting and players. It begins before a suit, when an adverse event first occurs. Frisch believes working with doctors at the earliest stages can help reduce claims and lawsuits. And Charles said the more insurance companies are realizing physicians need help earlier so suits can be avoided. The book gives advice on disclosure after an adverse event and tells physicians who they should talk to before talking to patients and families. It also tells what physicians can do in the time between the event and the suit. It explains how physicians should perform in the alien environment of the courtroom, both during discovery and trial. And it tells what goes on in the head of a plaintiff's attorney. "When physicians understand how attorneys play the game, the fog clears, and they become better defendants," Frisch said. The book also explains the stages of a trial and outlines common feelings defendants have and ways to cope at each stage. The book also examines the history and role of liability insurance in medical malpractice and suggests ways physicians can cope with increasing premium. It outlines things physicians need to consider when buying insurance and how insurers decide to settle suits.

Case studies from interviews with defendants are interesting examples of the way real people cope with the process. Non-physicians are included in the examples so doctors realize they aren't the only profession going through increased litigation. Although written for physicians and other healthcare providers, the book is helpful for anyone being sued.

In an effort to provide even more support for physicians in litigation, the authors created a web site, www.physicianlitigationstress.org. It brings together current resources of support for physicians, such as articles, other books, and links to other useful web sites.

PENNSYLVANIA'S FAIR SHARE ACT DECLARED UNCONSTITUTIONAL BY COMMONWEALTH COURT

As found on the website for Duane Morris, LLP August 3, 2005

The Commonwealth Court of Pennsylvania has stricken the Pennsylvania Fair Share Act as violative of the state's constitution. *DeWeese v. Weaver*, No. 567 M.D. 2002, slip. op. at 14 (Pa. Commw. Ct., filed July 26, 2005). The Fair Share Act was enacted to provide relief from Pennsylvania's joint and several liability statute and was seen by many as a positive step for much needed tort reform. The Fair Share Act applies to civil cases when two or more defendants are found liable. The Fair Share Act limits the liability of each defendant to the proportional damages equal to its proportion of the total liability. 44 Pa.C.S. §§ 2301-2336. For example, if two defendants were each found to be 50 percent liable, no one defendant would be accountable for more than 50 percent of the total verdict. The Fair Share Act eliminated joint and several liability under which any one defendant could be held accountable for the entire verdict.

The Commonwealth Court's ruling in *DeWeese* will result in the reinstatement of joint and several liability, as set forth in Pennsylvania's comparative negligence statute. 42 Pa.C.S. § 7102 (H) (b.1). Under the comparative negligence statute, if a defendant is found 60 percent or more at fault it can be held accountable for the full verdict. However, for intentional torts a defendant can be accountable for the full verdict regardless of the amount of liability assessed against that defendant. 42 Pa.C.S. § 7102 (H) (b.1) (3).

The constitutionality of the Fair Share Act was challenged by members of the Pennsylvania House of Representatives; the Respondents were the sponsors of the legislation. The Act's fatal flaw lay in the means by which the Act was enacted and was not a result of substantive review of the legislation. In October 2001, Senate Bill 1089 ("S.B. 1089") was introduced and was described as "an act amending the DNA Detection of Sexual and Violent Offenders Act" ("the DNA Act"). S.B. 1089 was approved by the Senate and sent to the House, where it was amended; it was returned to the Senate for approval as amended. S.B. 1089 bounced between the House and the Senate again with additional amendments. On its third pass through the House, the Fair Share Act was added to S.B. 1089, in March 2002. S.B. 1089 was ultimately passed in June 2002 and was signed into law by the governor. As enacted, S.B. 1089 included both the DNA Act and the Fair Share Act.

The Petitioners challenged the constitutionality of the dual purposes of S.B. 1089. Article 3, Section 3 of the Pennsylvania constitution prohibits the passage of bills containing more than one subject. *Id.* at 5-6. While the Respondents claimed the two parts of S. B. 1089 both dealt generally with the "business of the courts" or "judicial procedure" and, therefore, S.B. 1089 did not violate the Pennsylvania constitution, the Commonwealth Court disagreed. The court found that joining the Fair Share Act with the DNA Act in a single bill violated the single subject requirement of Article 3, Section 3. *Id.* at 11. Thus, the entire bill was declared unconstitutional and void.

While an appeal to the Pennsylvania Supreme Court is permissible, it is unlikely the Respondents will appeal or that an appeal will be successful, as the Pennsylvania high court previously declined to exercise jurisdiction over this matter. *City of Philadelphia v. Commonwealth*, 575 Pa. 542, 838 A. 2d 566 (2003). It remains to be seen whether the bill's sponsors will reintroduce it as a stand-alone piece of legislation.

For More Information

For further information or if you have any questions about this Alert, please contact any of the attorneys of the Trial Practice Group or the attorney in the firm with whom you are regularly in contact.

PATIENT SAFETY AND QUALITY IMPROVEMENT ACT OF 2005

The Patient Safety and Quality Improvement Act of 2005 was signed in to law by the President the end of August with little fanfare. Below is the statement from the White House –

"The Administration strongly supports House passage of S. 544 which would help reduce the number of number of medical errors that injure and kill thousands of Americans each year. The bill would authorize the establishment of patient safety organizations that would improve patient safety and the quality of health care through the collection and analysis of confidential data that can help avoid error, complications and suboptimal care.

Independent health care experts have noted that the absence of confidentiality protections and the resulting threat of lawsuits have impeded good-faith efforts to eliminate these errors. The result is needless suffering, lower quality care, higher health care costs, and more lawsuits. The President has called for legislation that would eliminate this critical obstacle to improving patient safety and health care quality. S. 544 is a critical step toward the President's goal of high quality, patient-centered health care.

S. 544 would assure doctors and other health professional that if they voluntarily report information to expert patient safety organizations, that information would be used for health care quality improvement efforts and will be kept privileged and confidential. This protection will encourage health care professionals to report and will result in the creation of valuable new information that can be used to identify best practices for eliminating errors and improving patient outcomes. We believe the bill will also help reduce the number of lawsuits resulting from medical errors. Information from medical records and other existing data sources will continue to be available for injured plaintiffs to pursue their claims in court, just as that information is available today. (Continued on page 4)

