

# HEALTH LAW

AMERICAN BAR ASSOCIATION YOUNG LAWYERS DIVISION



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## H.R. 1215 Could Have Lasting Effects on Medical Malpractice Litigation

By Dani Borel & Kelsey Clark

On June 28, 2017, the United States House of Representatives passed H.R. 1215, entitled the “Protecting Access to Care Act of 2017,” which would have a significant effect on medical malpractice litigation across the country if it becomes law. The bill seeks to extensively regulate malpractice suits, including limitations on recovery and evidentiary restrictions and mandates. H.R. 1215 has been referred to the Senate Judiciary Committee, but no vote has been scheduled. President Trump has indicated that if the bill passes the Senate, he will sign it into law.<sup>2</sup>

One of the primary provisions of H.R. 1215 is its mandate of a statutory cap on noneconomic damages in medical malpractice suits. Section 3 provides that, if a patient’s healthcare is paid for through any federally funded program (such as Medicare or Medicaid), and that patient files a medical malpractice suit against a provider, the patient’s noneconomic damages<sup>3</sup> are capped at \$250,000. Critically, the bill provides that this cap of \$250,000 does not preempt a statutory cap that is already in place under state law, and, thus, states that already have such caps in place (whether they are greater or lesser than \$250,000) will remain in place.<sup>4</sup> Moreover, the bill provides that if any award of future damages is greater than \$50,000, the court shall order that the future payments be paid periodically.<sup>5</sup>

Aside from the statutory cap imposed, H.R. 1215 also enacts several other restrictions on medical malpractice suits. For instance, it provides that courts shall supervise fee arrangements between attorneys and clients, including in contingency fee scenarios.<sup>6</sup> Specifically, the court has the power to reduce an attorney’s recovery, and the attorney may never recover more than (1) 40% of the first \$50,000.00, (2) 33.3% of the next \$50,000.00, (3) 25% of the next \$500,000, or (4) 15% of any amount greater than \$600,000.<sup>7</sup> These limitations on attorney recovery could result in fewer attorneys being willing to bring medical malpractice suits.

In addition, one of the most important aspects of H.R. 1215 is its limitations and requirements concerning expert testimony in medical malpractice lawsuits. Specifically, the bill states that a witness will not be competent to testify as an expert on behalf of either party unless the person is licensed to practice in the state where the act occurred or a contiguous bordering state, and

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<sup>2</sup> H.R.—*Protecting Access to Care Act of 2017*, The White House (June 14, 2017), <https://www.whitehouse.gov/the-press-office/2017/06/14/hr-1215-%E2%80%93-protecting-access-care-act-2017>.

<sup>3</sup> “Noneconomic damages” means damages for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, hedonic damages, injury to reputation, and all other non-pecuniary losses of any kind or nature incurred as a result of the provision or use of health care services or medical products.

<sup>4</sup> Section 3(e).

<sup>5</sup> Section 5(a).

<sup>6</sup> Section 4(a).

<sup>7</sup> Section 4(c). H.R. 1215 also states that where a state law specifies a lesser percentage or lesser total value of damages that may be claimed by an attorney representing a claimant in a health care lawsuit, the state law shall preempt the amounts espoused in H.R. 1215.

has practiced in one of those states during the year preceding the alleged wrongful act.<sup>8</sup> Moreover, if the defendant provider is a specialist, the expert witness shall specialize in the same specialty at the time of the occurrence.<sup>9</sup> Finally, an individual may not provide expert testimony in a medical malpractice suit unless, during the one-year period before the alleged wrongful act, the expert had devoted a majority of his professional time to either (1) active clinical practice in the same health profession as the defendant (including specialty) or (2) instruction of students in that specialty.<sup>10</sup>

These qualifications and restrictions on expert testimony undoubtedly make it more difficult for a plaintiff to meet his or her burden of proof in a medical malpractice action. In fact, this burden is heightened further by H.R. 1215's requirement that a plaintiff who desires to file a medical malpractice lawsuit must simultaneously file an affidavit of merit signed by a health care professional who meets these expert requirements. The affidavit of merit must provide: (1) the standard of care, (2) a breach of that standard, (3) the actions that should have been taken, (4) causation, and (5) a listing of the records reviewed.<sup>11</sup> In other words, the plaintiff is not permitted to file a medical malpractice suit unless he/she is able to demonstrate that he/she possesses the requisite expert testimony *at the time of filing*.

H.R. 1215 also provides for additional evidentiary requirements outside of its restrictions on expert testimony. For example, it states that if a healthcare provider communicates to a patient or family member any apology, fault, or sympathy relating to an unanticipated outcome, evidence of such communication shall be inadmissible in a suit against the provider for any purpose.<sup>12</sup> Again, this requirement limits the evidence that a medical malpractice plaintiff may use in support of his claim.

Finally, H.R. 1215 provides several miscellaneous provisions that could affect suits against healthcare providers. For example, it states that a healthcare provider who prescribes or dispenses a product pursuant to a valid prescription that is approved by the FDA shall not be named as a party to a products liability lawsuit involving the product, and, thus, the cause of action only exists against the manufacturer, seller, or distributor.<sup>13</sup> Moreover, a person is not permitted to commence a lawsuit against a provider unless the person has given 90 days' notice to the provider prior to filing.<sup>14</sup> Last, the bill establishes statutes of limitations for medical malpractice suits, specifically mandating that the action must be brought within three years after the injury, or one year after the claimant discovers the injury, whichever occurs first.<sup>15</sup>

Interestingly, H.R. 1215 seems to regulate state procedure and state tort law, which raises federalism concerns, as such issues are generally managed by the states. Anticipating this

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<sup>8</sup> Section 11(a).

<sup>9</sup> Section 13(a)(1).

<sup>10</sup> Section 13(a)(2).

<sup>11</sup> Section 14.

<sup>12</sup> Section 12.

<sup>13</sup> Section 6.

<sup>14</sup> Section 15.

<sup>15</sup> Section 2. H.R. 1215 provides that state law is not preempted by these time periods where the time espoused by state law is less than three years from the date of the injury or less than 1 year after discovery.

issue, the report accompanying H.R. 1215 clarifies that it contains an explicit Federal nexus in that “the bill’s reforms only apply to lawsuits ‘concerning the provision of [health care] goods or services for which coverage was provided in whole or in part via a Federal program, subsidy or tax benefit.’”<sup>16</sup> Accordingly, “there is a clear Federal interest in reducing the costs of such Federal policies.”<sup>17</sup>

Overall, the changes in H.R. 1215 are made to “provide checks and balances on otherwise unlimited lawsuits that increase the cost of health care and limit the availability of doctors nationwide.”<sup>18</sup> Interestingly, this same rationale of decreasing the cost of health care was used to support a statutory cap on medical malpractice damages passed in Florida, which was recently held to be unconstitutional by the Florida Supreme Court.

In *North Broward Hospital District v. Kalitan*,<sup>19</sup> the plaintiff, Susan Kalitan, was awarded \$4,718,011 by the jury in total damages, which was reduced to roughly \$2 million as required by Florida’s statutory cap on noneconomic damages. Florida’s law provides tiers of caps on noneconomic damages, allowing an individual who suffered “catastrophic injury” to be awarded more damages under a higher statutory cap. On appeal, Ms. Kalitan argued that the statutory cap on damages for pain and suffering was unconstitutional and violated the Equal Protection Clause. The Florida Supreme Court agreed.

Specifically, the court applied the rational basis test to determine whether the statute violated the Equal Protection Clause. The analysis is two-fold: (1) whether the statute bears a rational relationship to a legitimate state interest, and (2) whether the statute is imposed in an arbitrary and capricious manner. The providers argued that the state had a legitimate interest in imposing the subject statutory caps because there was a “medical malpractice crisis” in Florida in which insurance premiums for healthcare practitioners were astronomical. By reducing overall liability, it was believed that the cost of insurance would likewise decrease.

The Florida Supreme Court considered the legitimacy of this objective in passing the statutory caps on damages, and rejected that rationale for three reasons. First, it found that there was a lack of evidence demonstrating how the statutory cap alleviated the medical malpractice crisis. Second, even if the cap did result in decreased liability, the court noted “there is no mechanism in place to assure that savings are passed on from the insurance companies to the doctors in accordance with the stated purpose of alleviating the rising premiums.”<sup>20</sup> Finally, the court found that, even if there was a medical malpractice crisis at the time the statute was passed, current data reflects that “it has subsided,” and, thus, no rational basis persists for the cap.<sup>21</sup> Based on this reasoning, the Florida Supreme Court found that the statutory caps were unconstitutional as violating the equal protection clause.

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<sup>16</sup> H.R. Rep. No. 115-55, at 6 (2017).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 219 So. 3d 49 (Fla. 2017)

<sup>20</sup> *Id.* at 55.

<sup>21</sup> *Id.* at 59.

The *Kalitan* decision raises questions concerning the efficacy of H.R. 1215's mandatory statutory cap on noneconomic damages in medical malpractice suits. It is yet unclear whether Florida's decision on unconstitutionality would apply to H.R. 1215's mandate, but it is certainly possible that the mandate will be challenged on constitutional grounds based on the Florida Supreme Court's reasoning in *Kalitan*.

Currently, H.R. 1215 has been referred to and awaits consideration by the Senate Committee on the Judiciary. While it is too early to know if the Protecting Access to Care Act of 2017 will become a law, it is telling regarding the priorities of the new administration. The Protecting Access to Care Act of 2017 undoubtedly is a version of tort reform that will seek to protect the healthcare industry.

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