Sharing Liability

Federal malpractice tort reform is on the table, but it includes a worrisome provision to eliminate join and several liability.

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When the California Legislature enacted the Medical Injury Compensation Reform Act (MICRA) in 1975. it did not change pan of tort law involving the concept of joint and several liability Now that Congress is working on medical malpractice tort reform nationally there is a change beyond MICRA in the proposed federal legislation that could have disastrous financial consequences for physicians. The bills involved are HR 534 and S 354.

Currently in California, and in many other states, if a physician and hospital are both found liable for an injury or death after a jury verdict, the court will enter a judgment for the full amount of damages against both defendants. This makes the judgment both joint (between the defendants) and several (against each defendant separately).

In cases where the judgment amount is larger than the available insurance limit for the physician, the plaintiff can collect the balance of the judgment from the hospital, regardless of the relative fault of the doctor and hospital.

Since most meritorious medical malpractice cases settle before trial, currently many cases are settled for an amount well above the available medical malpractice insurance limit for any single physician. In those cases, the significant contribution by the hospital makes it possible to settle the entire case and avoid any additional financial exposure or risk for the physician. A hospital is often highly motivated to pay this additional money to resolve such cases before trial, because if it refuses settlement and then proceeds to trial, it may be liable for a much larger amount, even though a jury may find the hospital only 5 percent to 10 percent liable for the injury or death.

The reason for this financial exposure by the hospital lies with the fact that economic damages in California are subject to joint and several liability, while noneconomic damages, which are limited to a maximum of $250,000, are subject to apportionment by fault. This means that a hospital that is found 10 percent at fault by a jury would be liable for $25,000 in noneconomic damages, but up to 100 percent of the economic damages, including lost wages and medical care costs, which in some cases easily exceeds several million dollars.

If this system were changed by eliminating joint and several liability for economic damages, the financial impact on individual physicians would be devastating.

Currently, physicians greatly benefit from a system that places their hospitals in a position to function as their excess insurance coverage. Since most physicians have $1 million per occurrence professional liability insurance, in any case where the potential damages exceed $1 million, physicians may be held personally liable for any judgment in excess of that amount. In some cases, this can result in the physician

losing his or her house, declaring bankruptcy or both. This situation has not occurred very often in California despite many settlements in excess of $1 million, because when these cases are settled before, during or after trial, the settlement of the entire case ends the physician's further financial exposure.

However, if joint and several liability for economic damages were eliminated from the law, a hospital would have no incentive to pay to settle a case beyond its perceived percentage of fault, leaving the underinsured physician to pay the balance of any settlement from his or her own financial assets, after any available insurance is paid.

Should this occur, we will see a dramatic increase in the number of physicians in California and elsewhere who are forced to sell their homes and/or declare bankruptcy in order to satisfy judgments in excess of their insurance policy limits. In some cases, a plaintiff attorney may choose to settle with the hospital for 10 percent or 20 percent of the likely jury verdict, and then proceed to trial against the physician, regardless of any offer by the physician's insurance company. Since any insurance carrier cannot offer more than a physician's contractual insurance limit for a settlement before trial, such a case could not be settled without a substantial and often unobtainable sum from the defendant physician.

Under such circumstances, any plaintiff attorney would be required by the cannons of legal ethics in representing a client, to obtain a judgment against the physician and proceed to collect as much as possible.

Of even more concern is the situation in which a plaintiff attorney decides to proceed to trial against both the physician and the hospital. The hospital would then be required by its board of directors to "go after" the physician at trial in order to reduce the jury finding on percentage of fault against the hospital.

Currently, hospitals have no reason to attack or blame a physician at trial, and they have every reason to support the physician's actions and present a joint defense at trial. because if the plaintiff succeeds and obtains a judgment against both the physician and hospital, the hospital will be automatically liable for up to 100 percent of the economic damages.

However, if the law is changed and the hospital's ultimate financial liability can be limited to a jury finding of a low percentage of fault, then the hospital must go against the physician in order to save its own money. Even in cases where the defense wins the case, the emotions and feelings generated during a trial in which the hospital goes against the physician may make it impossible for that physician to ever practice at that hospital again.

Although the current law on joint and several liability has made it unnecessary for most hospitals to turn against their codefendant physicians at trial, I have been involved in at least one case where a for-profit hospital chain, Columbia-HCA, which is essentially self-insured, decided to go after a co-defendant physician. The motivation was that Columbia decided it would no longer be the "deep pockets" insurer for physicians on staff. The trial resulted in a substantial jury verdict and a finding of 90 percent liability on the physician and her medical group. The physician and her group both had $2 million policies so they were able to settle the case with the $4 million insurance available, after the hospital paid a separate

$1 million. However, if the physician did not have $4 million in available insurance, since the hospital settled for $1 million while the jury was deliberating, the plaintiff would have been obligated and required to collect as much as possible from the individual physician, her medical group, and their financial assets.

Since hospitals have far greater access to the liability insurance market than individual physicians, the current system that results in hospitals serving as a source of excess insurance coverage for physicians makes economic and financial sense.

This system has allowed physicians to maintain less than adequate insurance coverage for the rare catastrophic injury or death case, and thus keep their overall insurance cost low. But if hospitals can limit their total financial exposure by eliminating joint and several liability for economic damages in medical malpractice cases, then individual physicians, especially in high-risk specialties, will be required to greatly increase their insurance coverage, lest they risk losing their house and financial livelihood from any single medical malpractice claim.

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