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Medical Malpractice Bills: S. 22 and S. 23, 109th Congress

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Summary

Medical malpractice suits are governed, for the most part, by state law. S. 22, 109th Congress, the Medical Care Access Protection Act of 2006, or "MCAP Act," would impose federal standards on some aspects of medical malpractice suits, but it would leave other aspects to continue to be governed by state law. Unlike other pending medical malpractice bills, such as H.R. 5 and S. 354, S. 22 would not apply to products liability suits (i.e., it would apply only to medical malpractice suits against health-care providers, not to suits against manufacturers or sellers of defective medical products that cause injury). S. 23, the Healthy Mothers and Healthy Babies Access to Care Act, is identical to S. 22, except that S. 23 would apply only to suits alleging malpractice in connection with obstetrical or gynecological goods or services. This report summarizes the main provisions of S. 22 and S. 23.

These provisions include placing caps on noneconomic and punitive damages, eliminating joint and several liability, eliminating the collateral source rule when there is no right of subrogation, limiting lawyers' contingent fees, prescribing qualifications for expert witnesses, creating a federal statute of limitations, expanding Rule 11 sanctions, and authorizing periodic payment of future damages. S. 22 and S. 23 would not preempt state laws that are more favorable to defendants; however, in cases against defendants other than the United States, the proposed legislation would not preempt state caps on damages, whether they are higher or lower than the bills' caps.

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Preemption of State Laws

Although medical malpractice litigation is governed by state law, it affects interstate commerce, which means that the U.S. Constitution (Article I, section 8, clause 3) would permit Congress to regulate it and to preempt state laws that regulate it. S. 22 and S. 23, 109th Congress, would impose federal standards on some aspects of medical malpractice litigation but would leave other aspects to continue to be governed by state law.[2] Even with respect to those aspects of medical malpractice litigation on which S. 22 would impose federal standards, it would not preempt every state law. S. 22 would not preempt any state law "that imposes greater procedural or substantive protections (such as a shorter statute of limitations) for a health care provider or health care institution," and it would not preempt any state law "that permits and provides for the enforcement of any arbitration agreement related to a health care liability claim" (§ 11(c)(2)). S. 22 would also not preempt "any State law (whether effective before, on, or after the date of enactment of this Act) that specifies a particular monetary amount of compensatory or punitive damages (or the total amount of damages) that may be awarded in a health care lawsuit, regardless of

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[1] Another CRS report, without making reference to any particular legislation, discusses most of the subjects that S. 22 and S. 23 address, explaining the legal concepts each involves (in greater depth than the present report does) and offering pros and cons of each. See CRS Report RL31692, *Medical Malpractice Liability Reform: Legal Issues and Fifty-State Survey of Caps on Punitive Damages and Noneconomic Damages*, by (name redacted).

[2] This report will hereinafter refer only to S. 22, but everything it states about S. 22 applies equally to the parallel provisions of S. 23.

whether such monetary amount is greater or lesser than is provided for under this Act ..." (§ 11(b)).[3] In short, S. 22 would preempt only those state laws that are more favorable to plaintiffs than S. 22 would be, except that S. 22 would not preempt state caps on damages, whether such caps are higher or lower than the bill's. S. 22's cap on caps on damages, in other words, would apply only in states that presently have no caps and would cease to apply in states that subsequently enact caps.

S. 22 contains one other preemption provision, which states that the bill would "supersede chapter 171 of title 28, United States Code," to the extent that such chapter "(1) provides for a greater amount of damages or contingent fees, a longer period in which a health care lawsuit may be commenced, or a reduced applicability or scope of periodic payment of future damages, than provided in this Act; or (2) prohibits the introduction of evidence regarding collateral source benefits" (§ 11(a)). Chapter 171 is the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, which authorizes suits against the United States for torts (including medical malpractice) committed by federal employees in the scope of their employment, and for torts committed by nonfederal employees who, by statute, are deemed federal employees for liability purposes.[4] The FTCA also immunizes federal employees, and those deemed federal employees, from liability under state tort law. The FTCA, except for certain matters, such as its statute of limitations, applies the law of the state where the tort occurred.

If S. 22 becomes law, then, in medical malpractice suits against the United States, its provisions would apply with respect to the items specified in the bill's language that is quoted in the first sentence of the previous paragraph. The first of these items is damages, so S. 22 would supersede the FTCA to the extent that the FTCA provides for greater damages than S. 22. The FTCA, however, does not provide anything with respect to damages; rather, it applies the relevant state law on damages. Under S. 22, then, if the FTCA called for application of a cap on damages that is higher than S. 22's, then S. 22's cap would apply. Thus, under S. 22, if the defendant is *not* the United States, then S. 22's caps on damages would not preempt higher state caps, but if the defendant is the United States, then S. 22's caps would preempt higher state caps. With respect to the other items specified in the bill's language quoted in the first sentence of the previous paragraph, S. 22 would treat the United States the same as other defendants: S. 22 would preempt state law only if it is more favorable to plaintiffs.

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[3] On this point, S. 22 follows H.R. 5, but not S. 354, which would preempt state caps that are higher than S. 354's. This provision of S. 22 raises the question of whether a state that wishes to have no cap may enact a cap that is so high — say, $1 billion — that it is effectively no cap, and thereby not be subject to the bill's cap.

[4] For information on statutes that place nonfederal employees under the FTCA, see CRS Report 97-579, *Making Private Entities and Individuals Immune from Tort Liability by Declaring Them Federal Employees*, and CRS Report RS20984, *Public Health Service Act Provisions Providing Immunity from Medical Malpractice Liability*, both by (name redacted).

Cap on Noneconomic Damages

Section 5 of S. 22 would impose a $250,000 cap on noneconomic damages in any health-care lawsuit, "regardless of the number of parties other than a health care institution[5] against whom the action is brought or the number of separate claims or actions brought with respect to the same occurrence." If a final judgment is rendered against a health-care institution, then it may be subject to up to $250,000 in noneconomic damages, which apparently means that the claimant could recover up to $500,000 in noneconomic damages. If a final judgment is rendered against more than one health-care institution, each institution may be subject to up to $250,000 in noneconomic damages, "except that the total amount [of noneconomic damages, apparently] recovered from all such institutions in such lawsuit shall not exceed $500,000," which apparently means that the claimant could recover up to $750,000 in noneconomic damages. As noted above, these caps would apply only in states that have no cap before enactment of S. 22 and that do not enact one subsequently.[6]

Economic damages refer to "objectively verifiable monetary losses" (§ 3(6)) that result from an injury, such as medical expenses, lost wages, and rehabilitation costs. S. 22 would not cap economic damages (although it would not prevent a state from doing so; see the last phrase in § 11(b)). Noneconomic damages refer to pain and suffering, loss of consortium, "and all other nonpecuniary losses of any kind or nature" (§ 3(14)). Both economic and noneconomic damages are compensatory damages (§ 3(4)), as opposed to punitive damages, which are awarded "for the purpose of punishment or deterrence" (§ 3(15)).

Punitive Damages: Burden of Proof, Standard for Award, Cap

Section 8(a) provides that punitive damages may be awarded if otherwise permitted by state law, if the claimant proves "by clear and convincing evidence" that the defendant "acted with malicious intent to injure the claimant, or ... deliberately failed to avoid unnecessary injury that [the defendant] knew the claimant was substantially certain to suffer." S. 22 would thus preempt state law regarding the burden of proof and standard for awarding punitive damages, except in states that provide greater protection for defendants.[7]

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[5] The phrase "other than a health care institution" does not appear in the parallel sections of H.R. 5 and S. 354, and these bills never permit noneconomic damages in excess of $250,000 (except that H.R. 5, like S. 22, would not preempt state caps, even if they are higher than S. 22's). Section 3(8) of S. 22 would define "health care institution" as an "entity licensed under Federal or State law to provide health care services...."

[6] Section 5(c)(1) provides that, for purposes of applying the cap on noneconomic damages, "an award for future noneconomic damages shall not be discounted to present value." This apparently means that if a jury awards $260,000 in future noneconomic damages, and such amount could be paid in the form of an annuity that costs $240,000, the higher figure would control and the future noneconomic damages would be reduced to $250,000, not to $240,000.

[7] *See* CRS Report RL31721, *Punitive Damages in Medical Malpractice Actions: Burden of Proof and Standards for Awards in the Fifty States*, by (name redacted)

Section 8(b)(2) would impose a cap on punitive damages of $250,000 or two times the amount of *economic* (not of all compensatory) damages awarded, whichever is greater. As with S. 22's cap on noneconomic damages, the cap on punitive damages would apply only in states that have no cap before enactment of S. 22 and that do not enact one subsequently.

Liability for Prescribing or Dispensing Drugs, Etc.

Section 8(c) provides that "[a] health care provider who prescribes, or who dispenses pursuant to a prescription, a drug, biological product, or medical device approved by the Food and Drug Administration, for an approved indication of the drug, biological product, or medical device, shall not be named as a party to a product liability suit...." In other words, if a health-care provider had not been negligent in prescribing or dispensing a product, then he or she could not be sued merely because the product was defective. This provision appears to be the only one in S. 22 that would grant immunity from liability, as opposed merely to limiting it. This immunity would appear to have limited practical import, however, because under state law, if a health-care provider is sued for distributing a defective product, he or she may bring prior sellers into the suit, and the first seller (the manufacturer) will usually end up paying the damage award.

S. 22 would not prevent a person who is injured by a defective product from bringing a products liability suit under state law against a manufacturer or seller, and such a suit would not be affected by S. 22. If, however, the injured party wished to sue a health-care provider for negligence in prescribing or dispensing the product, then the injured party would have to do so in a separate lawsuit, to which S. 22 would apply.

Eliminating Joint and Several Liability

Section 5(d) would eliminate joint and several liability in medical malpractice suits. Joint and several liability is the common-law rule that, if more than one defendant is found liable for a plaintiff's injuries, then each defendant may be held 100% liable. With joint and several liability, the plaintiff may not recover more than once but may recover all of his or her damages from fewer than all liable defendants, with any defendant who pays more than its share of the damages entitled to seek contribution from other liable defendants. Under S. 22, each defendant would be liable only "in direct proportion to such party's percentage of responsibility," and if one defendant was, for example, insolvent, then no other defendant would have to pay the insolvent defendant's share of damages.

The main argument for eliminating joint and several liability is that it allows a plaintiff to recover his or her entire damage award from a "deep pocket" defendant who may have been only minimally liable. The main argument for retaining joint and several liability is that it is preferable for a wrongdoer to pay more than its share of the damages than for an injured plaintiff to recover less than the full amount to which he or she is entitled.

Modifying the Collateral Source Rule

The collateral source rule is the common-law rule that allows an injured party to recover damages from the defendant even if he is also entitled to receive them from a third party (a "collateral source"), such as a health-insurance company, an employer, or the government. To abolish the collateral source rule would be to require courts to reduce damage awards by amounts that a plaintiff receives or is entitled to receive from collateral sources.

Often a collateral source, such as a health insurer or the government, has, by contract or statute, a right of subrogation against the tortfeasor (the person responsible for the injury). This means that the collateral source takes over the injured party's right to sue the tortfeasor, for up to the amount the collateral source owes or has paid the injured party. Although the collateral source rule may enable the plaintiff to recover from both his insurer and the defendant, if the collateral source has a right of subrogation, then the plaintiff must reimburse the collateral source for the amount it paid him. If the collateral source rule were eliminated, then the defendant would not have to pay the portion of damages owed or paid by a collateral source, and the collateral source would not be able through subrogation to recover the amount it paid the plaintiff. In the medical malpractice context, therefore, eliminating the collateral source rule would benefit liability insurers at the expense of health insurers and other collateral sources, because it would deny injured parties the portion of their damages awards from which they would have reimbursed their collateral sources.

Section 7 of S. 22 would provide that, except where there is a right of subrogation, the amount of damages would be reduced by the amount of collateral source benefits, less any insurance premiums or other payments made by the claimant to obtain such benefits. Thus, under S. 22, if there is a right of subrogation, then a plaintiff, as at present, could not recover twice because he would have to reimburse the collateral source. If there is no right of subrogation, then the plaintiff could not recover twice because S. 22 would preclude him from doing so. S. 22, in this respect, would benefit defendants but would not affect collateral sources because it would benefit defendants only in cases in which collateral sources would have no right of subrogation anyway.

Limiting Lawyers' Contingent Fees

A contingent fee is one in which a lawyer, instead of charging an hourly fee for his services, agrees, in exchange for representing a plaintiff in a tort suit, to accept a percentage of the recovery if the plaintiff wins or settles, but to receive nothing if the plaintiff loses. Payment is thus contingent upon there being a recovery. Plaintiffs agree to this arrangement to afford representation without having to pay anything out-of-pocket. Lawyers agree to it, despite the risk of not being compensated, because the percentage they receive if they win or settle — usually from 33⅓% to 40% — generally amounts to more than an hourly fee would.

Section 6(a)(2)(B) of S. 22 would impose a cap with a sliding scale in medical malpractice cases: 40% of the first $50,000 the plaintiff recovered, 33⅓% of the next $50,000, 25% of the next $500,000, and 15% of any additional amount.

Expert Witnesses

Section 6(c) of S. 22 would prescribe qualifications to be an expert witness in a health-care lawsuit. An expert witness would have to be appropriately credentialed or licensed by a state, typically treat the condition at issue, be substantially familiar with applicable standards of care, be a physician if the plaintiff's claim involves treatment that was recommended or provided by a physician, and be an expert in the same specialty or subspecialty as the defendant unless the standards of care in the two are similar.

Federal Statute of Limitations

The statute of limitations — the period within which a lawsuit must be filed — for medical malpractice suits under state law is typically two or three years, starting on the date of injury. Sometimes, however, the symptoms of an injury do not appear immediately, or even for years after, malpractice occurs. Many states therefore have adopted a "discovery" rule, under which the statute of limitations starts to run only when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, his injury — or, sometimes, his injury and its cause.

Section 4(a) of S. 22 provides that

> Except as otherwise provided in this section, the time for the commencement of a health care lawsuit shall be 3 years after the date of manifestation of injury or 1year after the claimant discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first.[8]

Section 4(b), however, adds that the time for commencement "shall not exceed 3 years after the date of manifestation of injury," except in cases of fraud, intentional concealment, or "the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person."

These two subsections, rather than imposing a time limitation that begins on the date of injury or on the date of discovery of the injury, would cut off the right to sue upon the earlier of two different periods — three years and one year — that begin, respectively, on the date of manifestation of injury and discovery of the injury. S. 22 defines neither term, but it seems to intend that if the injury is discovered (through an X-ray or blood test, for example) before it becomes manifest (i.e., before

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[8] S. 22 does not call this provision a statute of limitations. A statute of limitations is typically an affirmative defense, which means that the defendant must raise it; if the defendant fails to raise it, then the plaintiff may sue regardless of how much time has passed. See, e.g., Federal Rule of Civil Procedure 8(c). S. 22 could be construed to be a statute of limitations or it could be construed to place the burden of proof on the plaintiff to show that his or her injury occurred within the time period allowed.

symptoms appear), then the statute of limitations would be one year. If, by contrast, symptoms appear before the injury is discovered, then the statute of limitations may be three years or it may be less than three years.[9] Suppose that symptoms appear six months after the malpractice occurs, and the injury that caused those symptoms is discovered six months after that. The plaintiff would have to sue within one year of discovery, which would be 18 months after manifestation (and two years after the malpractice occurred).

Section 4(c) provides that an action by a minor must be commenced within three years from the date of manifestation — there is no alternative discovery period — except that, if the minor is younger than 6, the action must be commenced within three years of manifestation or prior to the minor's eighth birthday, whichever provides a longer period. Thus, a minor who is younger than 5 on the date of manifestation will have more than three years to file suit.

Rule 11 Sanctions

Rule 11 of the Federal Rules of Civil Procedure (which are published in title 28, U.S. Code) provides that a federal court may impose sanctions on attorneys, law firms, or parties who, among other things, file frivolous claims or defenses, or file "a pleading, written motion, or other paper ... for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." The sanctions that a court may impose include "an order to pay a penalty into court," or, if "warranted for effective deterrence, an order directing payment" to the opposing party "of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Such sanctions "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."

Section 4(d) of S. 22[10] provides that whenever a federal or state court determines that there has been a violation of Rule 11 "(or a similar violation of applicable State court rules)"[11] in a health-care liability action, the court *shall* impose sanctions that "*shall* include an order to pay the other party or parties for the reasonable expenses incurred as a direct result" of the violation, and that are "*sufficient* to deter repetition of such conduct or comparable conduct by others similarly situated, and to

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[9] The date on which the plaintiff "discovers" the injury may refer to the date on which the plaintiff learns the nature of the condition that caused the symptoms, which will not necessarily be the date on which he learns that the condition was caused by medical malpractice. Keep in mind that he bill refers to discovering the *injury*, not to discovering the *cause* of the injury.

[10] This provision of S. 22 is similar to sections 2 and 3 of H.R. 420, the Lawsuit Abuse Reduction Act of 2005, which passed the House on October 27, 2005. See CRS Report RS21931, *Lawsuit Abuse Reduction Act of 2005*, by (name redacted) and (name redacted).

[11] This provision of S. 22 might not apply if a state has a statute, rather than a court rule, that is similar to Rule 11.

compensate the party or parties injured by such conduct."[12] The words italicized above indicate the significance of this subsection of S. 22: sanctions would be mandatory and it would be mandatory that they include orders to pay the opposing side's reasonable expenses; in addition, such orders would have to be in amounts *sufficient* to deter repetition rather than merely *limited* to what is sufficient to deter repetition. In addition, these changes, unlike Rule 11, would apply in state court rules as well as in federal courts.

Another change that this subsection of S. 22 would make is that whereas Rule 11 *authorizes* sanctions against "attorneys, law firms, or *parties*" that have violated or are responsible for a violation of Rule 11, S. 22 would *require* sanctions against "attorneys, law firms, or *pro se litigants*" that have violated or are responsible for a violation of Rule 11. A "pro se litigant" is one who represents himself, without an attorney. S. 22, thus, in cases of violations of Rule 11 or similar state court rules, would not *require* sanctions against litigants with attorneys in health-care liability actions, but it would require sanctions against litigants without attorneys. It seems uncertain whether it would allow Rule 11 to continue to *authorize* sanctions against litigants with attorneys in health-care liability actions (i.e., it seems uncertain the extent to which S. 22 would preempt Rule 11 in this respect).

Periodic Payment of Future Damages

Traditionally, damages are paid in a lump sum, even if they are for future medical care or future lost wages. In recent years, however, "attorneys for both parties in damages actions have occasionally foregone lump-sum settlements in favor of structured settlements, which give the plaintiff a steady series of payments over a period of time through the purchase of an annuity or through self-funding by an institutional defendant."[13]

Section 9 of S. 22 provides that

> In any health care lawsuit, if an award of future damages, without reduction to present value, equaling or exceeding $50,000, is made against a party with sufficient insurance or other assets to fund a periodic payment of such a judgment, the court shall, at the request of any party, enter a judgment ordering that the future damages be paid by periodic payments. In any health care lawsuit, the court may be guided by the Uniform Periodic Payment of Judgments Act promulgated by the National Conference of Commissioners on Uniform State Law.

Although this provision states that an award of future damages shall not be reduced to present value to determine whether it equals or exceeds the $50,000 minimum necessary for a party to require the court to order periodic payments, it

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[12] None of the italics used in quotations in from this section of the report are in Rule 11 or in S. 22.

[13] Annotation, *Propriety and Effect of "Structured Settlements" Whereby Damages are Paid in Installments Over a Period of Time, and Attorneys' Fees Arrangements in Relation Thereto*, 31 ALR4th 95, 96.

does not state whether the amount of the award of future damages would be converted to present value. Not to require such conversion "could be a very major change, significantly reducing awards, if it is intended to allow a defendant to pay, for example, a $1 million award over a 10-year period at $100,000 a year. On the other hand, if it requires the jury award to be converted into present value terms — an annuity with a present value of $1 million — the reform doesn't mean that much; as a practical matter, the defendant would be paying the same amount as before."[14] The defendant, that is, would have to spend $1 million for an annuity that, as it earned interest over the years of its distribution, would yield the plaintiff more than $1 million. Had the defendant paid the plaintiff a lump sum of $1 million, then the plaintiff could have purchased that same annuity.

Effect on Federal Vaccine Legislation

Section 10 of S. 22 provides that the bill would not preempt title XXI of the Public Health Service Act, which is the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 — 300aa-34; and would not affect part C of title II of the Public Health Service Act, which is the Smallpox Emergency Personnel Protection Act of 2003, 42 U.S.C. §§ 239-239h.

[14] Victor Schwartz, *Doctors' Delight, Attorneys' Dilemma*, Legal Times, Health-Care Law Supplement (Feb. 28, 1994) at 30.