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Federal Tort Reform Of Med Malpractice Actions Is Likely

By **H. Thomas Watson, Horvitz & Levy LLP**

Law360, New York (December 18, 2016, 8:05 PM EST) -- The inaugural edition of the Law360 Medical Malpractice section opened with an article entitled "Medical Malpractice Won't Be Focus Of Trump Tort Reform." That article suggested that, "[b]ecause the Affordable Care Act did not address medical malpractice reform, … it is unlikely Trump will try and carve out such relief when he revises or guts Obamacare since he won't want to disturb the already extensive tort reform laws many states have in place." There are some very good reasons to believe the contrary.

First, House Speaker Paul Ryan's "A Better Way" agenda established a likely foundation for new federal health care legislation to replace Obamacare. The June 22, 2016, version of Ryan's "A Better Way" health care plan (see as of Dec. 8, 2016) includes the following five principles: (1) repeal Obamacare; (2) provide all Americans with more choices, lower costs and greater flexibility by opening the consumer-directed health care market, ensuring portability of coverage, preserving employer-sponsored health insurance, allowing consumers to purchase coverage across state lines, expanding risk-pooling opportunities, and preserving employee wellness programs; (3) protect our nation's most vulnerable, including patients with pre-existing conditions, loved ones struggling with complex medical needs, and other vulnerable Americans who need access to high-quality and affordable coverage options; (4) spur innovation in health care by reducing regulations and building on the 21st Century Cures Act, which the House passed in 2015; and (5) protect and preserve Medicare by ensuring that it becomes and continues to be financially sustainable.

Ryan's plan also envisions enacting meaningful medical liability reform, and specifically identifies the success of such tort reform statutes in California and Texas as possible models. The plan states that "comprehensive medical liability reform that includes caps on noneconomic damages will improve patients' access to quality care while reducing the overall cost of health care in America. Our plan will include liability reform that includes caps on noneconomic damage awards, ensuring plaintiffs can recover full economic damages and that patients will not have their damages taken away by excessive lawyer contingency fees." Thus, California's Medical Injury Compensation Reform Act (MICRA) suggests how federal tort reform may be enacted.

In 1975, in response to the "medical malpractice insurance crisis," the California legislature enacted MICRA, which sought to contain the rapidly escalating cost of medical malpractice insurance by limiting health care providers liability exposure. (Western Steamship Lines Inc. v. San Pedro Peninsula Hospital, 876 P.2d 1062, 1068 (Cal. 1994).) Specifically, the MICRA statutes: (1) put limits on contingency attorney fee agreements (Cal. Bus. & Prof. Code, § 6146); (2) allowed defendants to introduce evidence of collateral source benefits received by the plaintiff, and precluded those collateral sources from asserting subrogation rights to seek reimbursement of benefits paid to the plaintiff (Cal. Civ. Code, § 3333.1); (3) limited the recovery of noneconomic damages to $250,000 (Cal. Civ. Code, § 3333.2); (4) imposed a shortened statute of limitations (Cal. Code Civ. Proc., § 340.5); (5) mandated prelitigation notice regarding an impending lawsuit (Cal. Code Civ. Proc., § 364); (6) allowed judgments to award periodic payments for future damages (Cal Code Civ. Proc., § 667.7); and (7) encouraged and facilitated arbitration (Cal. Code Civ. Proc., § 1295).

In addition, about a decade after California's Legislature enacted MICRA, it enacted Code of Civil Procedure Section 425.13, which protects health care providers from unsubstantiated punitive damages claims by requiring the trial court to carefully review such a proposed complaint and supporting and opposing affidavits to determine whether the plaintiff has stated and substantiated a legally sufficient claim of malice, oppression or fraud. (Central Pathology Service Medical Clinic

Inc. v. Superior Court, 832 P.2d 924, 928-31 (Cal. 1992).)

By their terms, California's MICRA statutes and Section 425.13 apply to actions seeking personal injury damages (1) against a health care provider, and (2) based on professional negligence. Thus, these statutes apply whenever the allegedly negligent conduct was "necessary or otherwise integrally related to the medical treatment and diagnosis of the patient" and therefore implicates a duty that the defendant "owes to a patient by virtue of being a health care provider." (Flores v. Presbyterian Intercommunity Hospital, 369 P.3d 229, 236-37 (Cal. 2016).)

Moreover, Rep. Tom Price, R-Ga., President-elect Donald Trump's nominee for Secretary of the U.S. Department of Health and Human Services, is expected to take an active role in dismantling the Affordable Care Act. In 2009, Price introduced H.R. 3400 during the 111th Congress as comprehensive federal health care legislation to replace Obamacare. Like Ryan's plan, Price's bill included comprehensive tort reform provisions. (See H.R. 3400, Part V, §§ 501-515, as of Dec. 8, 2016.)

Specifically, H.R. 3400 included tort reform provisions that: (1) limit recovery of noneconomic and punitive damages awarded in health care lawsuits (§§ 504, 507); (2) require several, rather than joint and several, liability where more than one party is liable for damages (§ 504(d)); (3) constrain the contingency fee agreements in health care litigation (§ 505); (4) permit defendants to introduce evidence of collateral source payments to the plaintiff covering the medical expense damages and eliminating equitable and legal subrogation claims by the health care providers (§ 506); and (5) authorize periodic payments of future damages awards (§ 508). In other words, like Ryan's plan for reforming federal health care laws, Price proposed legislation that closely tracks the MICRA statutes that California enacted more than four decades ago.

Based on the history of how the people who will be responsible for replacing Obamacare have actually stated their plans for replacing Obamacare, it seems reasonable to anticipate that tort reform provisions similar to California's MICRA statutes will be part of that federal legislation. Numerous aspects of these California MICRA statutes have been litigated and decided over the last 40-plus years, as described in detail in the Horvitz & Levy MICRA Manual (as of Dec. 8, 2016.) To the extent the new federal laws track California's statutes, the appellate decisions analyzing the California statutes and resolving disputes regarding their meaning and application should be persuasive authority regarding how the analogous federal statutes should be interpreted and applied.

Prudent counsel in jurisdictions where these types of medical liability tort reform laws will be applied for the first time once federal legislation is enacted should start becoming familiar with them now.

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