Tucker Ellis LLP

CLIENT ALERT

OHIO TORT REFORM LEGISLATION EXPANDING APOLOGY STATUTE AND PROVIDER IMMUNITIES NEARS PASSAGE

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As the Ohio General Assembly looks to wind down its "lame duck" session in the coming weeks, one bill that the medical community should monitor closely is H.B. 7. Reflecting a series of tort reform proposals that have been considered for several years, H.B. 7 cleared the House of Representatives this past June. At a November 13, 2018 hearing, the Senate Judiciary Committee heard testimony from several supporters of the bill (including Raymond Krncevic, author of this Client Alert), and at a subsequent hearing on November 29, the Committee reported the bill out favorably, clearing it for potential passage by the full Senate and enactment before year's end.

If it becomes law, H.B. 7 will make the following changes to Ohio law:

- Amend the Apology Statute to codify the Supreme Court of Ohio's ruling in *Stewart v. Vivian* to specifically include statements of "error" and "fault," and to extend its protection to statements made pursuant to "good faith" reviews of adverse events
- Provide qualified immunity to health care providers responsible for deciding whether to hold or discharge patients who may have a mental health condition that threatens the health or safety of themselves or others
- Require a higher standard of proof in cases alleging malpractice against providers who are rendering emergency care during a disaster situation
- Prohibit the use of CMS regulations and payor reimbursement policies in determining whether providers complied with the standard of care
- Establish an alternative process for initiating a medical claim so as to reduce the practice of indiscriminately naming all known treaters in a lawsuit
- Clarify the method by which a 180-day letter is to be served

Although not guaranteed, a number of factors are working in favor of H.B. 7 becoming law. In addition to the significant bipartisan support H.B. 7 has received thus far, the Ohio Association for Justice—a source of opposition to numerous tort reform measures in the past—has taken a neutral stance on this bill. Although Governor Kasich has not declared a formal position on the legislation, a veto appears highly unlikely.

APOLOGIES, *STEWART v. VIVIAN*, AND "GOOD FAITH" REVIEWS

Ohio's Apology Statute, R.C. 2317.43, already bars the use of a medical provider's statements or conduct "expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence" as evidence of liability or as a statement against interest when made to a patient or patient's representative concerning an unanticipated outcome of medical care. At issue in *Stewart v. Vivian*, 151 Ohio St.3d 574, was whether statements regarding fault or error fell within the meaning of this statutory language, and thus were likewise inadmissible. The Ohio Supreme Court answered in the affirmative.

H.B. 7 codifies the *Stewart v. Vivian* decision by adding statements expressing "fault" or "error" to the list of inadmissible statements contained in R.C. 2317.43. But it also goes an important step further. It makes these protections applicable to statements made to patients or their representatives concerning the outcome of a "review conducted in good faith," which the bill defines as "activities undertaken by a health care provider * * * with the purpose of determining the cause of or reasons for an unanticipated outcome, and initiated and completed during the first forty-five days following the occurrence or discovery of an unanticipated outcome." This change clarifies a legal gray area, and should afford greater assurance to health care providers trying to explain outcomes to patients and their families following adverse events.

PROTECTING PROVIDERS FROM THE "PINK SLIP" CONUNDRUM

Hospitals frequently deal with patients who, although admitted for a clinical condition, also have an apparent mental health issue that may cause them to pose a risk to their own safety or someone else's. A hospital's potential exposure materializes when these patients are medically ready for discharge: Should hospitals hold these patients against their will for a behavioral health assessment, even if they are medically cleared for discharge, and risk a false imprisonment lawsuit? Or release them, and face a malpractice suit if the patients subsequently harm themselves or someone else? Current law provides qualified immunity for mental health professionals wrestling with how to address this situation, but not for other clinical providers.

H.B. 7 remedies this situation by extending qualified immunity to physicians, physician assistants, nurse practitioners, and hospitals if they believe that they are either discharging, or refusing to discharge, such patients "in the good faith exercise of professional judgment according to appropriate standards of professional practice." If they do so, these professionals will be subject neither to civil damages nor disciplinary action by a state licensing or regulatory body. Notably, this qualified immunity does not extend to injunctive relief, meaning that patients who believe, or whose families believe, that they are being wrongly held against their will can still petition a court to order their release from the hospital. In other words, this legislative change does nothing to restrict existing rights under the "pink slip" statute (*cf.* R.C. 5122.10 *et seq.*).

HEIGHTENED STANDARD OF PROOF DURING A DECLARED DISASTER

The bill also offers qualified immunity from a medical claim to certain health care providers and emergency medical technicians who provide emergency medical services, first aid, or other emergency professional services to patients whose injuries or conditions result from a disaster situation. Recognizing that medical care in such situations is often delivered in a chaotic environment where staff and resources are stretched thin, H.B. 7 requires a plaintiff to prove not only that the providers breached the standard of care, but that their actions "constitute a reckless disregard for the consequences so as to affect the life or health of the patient." The bill defines "reckless disregard" as conduct that a provider knew or should have known at the time "created an unreasonable risk of injury, death or loss to person or property" that was "substantially greater" than negligent conduct. This heightened level of proof applies only when a disaster has been officially declared as such by the federal, state, or local government. Importantly, the heightened standard does not apply if a professional's actions exceed his or her scope of practice.

BARRING THE USE OF INSURANCE REIMBURSEMENT RULES TO ESTABLISH STANDARD OF CARE

In the drive to shift from "fee-for-service" to "pay-for-performance" as a payment model for medical services, Medicare and Medicaid regulators are adopting, with increasing frequency, policies that limit or prohibit payment to providers based on certain quality outcomes. Private insurers are following suit. To stave off the potential use of an insurer's refusal to pay for care as evidence that the care in question fell below acceptable quality standards, H.B. 7 states that these reimbursement regulations, determinations, and policies are inadmissible at trial and cannot be used to demonstrate that physicians and nurses failed to meet the standard of care.

PROVIDING AN ALTERNATIVE TO NAMING UNNECESSARY DEFENDANTS IN MALPRACTICE LAWSUITS

All too often, numerous defendants are initially named in medical malpractice suits, even if they had little or no involvement in the care at issue, only to be later dismissed from the case. Plaintiff's counsel typically resort to this method either as a precaution to ensure that all potentially liable caregivers are named, or when their clients present them with a case just prior to the expiration of the statute of limitations, giving them little time to review the medical chart to assess whose care is actually at issue. In the meantime, caregivers who have no material involvement in the case must deal with the stress and expense that come with being named in a lawsuit. H.B. 7 attempts to curb this practice by setting forth an alternate process: If, at the time of filing a complaint, a plaintiff has not already served a 180-day letter, then the plaintiff will be given an additional 180 days beyond the statute of limitations to add parties to the suit without a for-cause showing. This provision makes clear that it does not alter or supplant the existing 180-day letter process.

CLARIFYING HOW TO SERVE 180-DAY LETTERS

Speaking of 180-day letters, H.B. 7 also puts an end to process servers, regular mail, and other methods of serving a letter under R.C. 2305.113. Going forward, plaintiffs are to serve 180-day letters by certified mail, return receipt requested, upon a potential defendant at any of the following addresses: the person's personal address, professional practice address, employer's address, or the address on file with that person's licensing agency.

NEXT STEPS

Now that the Judiciary Committee has cleared H.B. 7 by unanimous vote, Senate action could come swiftly in the next several weeks, either as a stand-alone bill or as part of a larger legislative package. Unless adopted as part of a larger emergency measure, H.B. 7 would take effect 90 days after being signed by the Governor and filed with the Secretary of State. In anticipation of passage:

1. Hospitals should consider undertaking a legal review of their policies, particularly those addressing "pink slips," psychiatric evaluation, discharge against medical advice, and other related policies to ensure they comport with the new prerequisites for qualified immunity.
2. Medical providers (both physician practices and hospitals) should review their procedures addressing disclosure of adverse events to patients, as well as their protocols concerning reviews of adverse clinical events, how those events are documented, and how and when the results are reported to patients.
3. Emergency service providers (hospitals, ambulance companies, and licensed professionals in these fields) will want to evaluate the potential effects of the disaster provisions of H.B. 7 on their operations.
4. Professional liability carriers and claims staffs should to consider how the revised Apology Statute and qualified immunity for mental health and disaster situations would affect liability assessments, affirmative defenses, and overall strategy. They should also plan on adjusting internal processes and calendars to account for the fact that a medical claim could be timely up to 180 days after the statute of limitations runs, even without a 180-day letter.

ADDITIONAL INFORMATION

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