

Legislative Update 2017

by Tyler Chance Yarbro

The Tennessee General Assembly adjourned for the year on Wednesday, May 10, 2017. Not every piece of legislation that passed has made its way to the governor for his signature, but the dust will soon settle and it is time review what happened, or, just as important, what didn't happen this year.

There were a number of bills that were before the legislature this year that should strike fear in the heart of any plaintiff's side tort practitioner. Fortunately, not much damage was done. At least not this year...

THE PROPOSED "PATIENTS' COMPENSATION SYSTEM"

Legislation proposed in 2015 and revisited in 2016 that seeks to move medical malpractice claims out of the court system and into a Patients' Compensation System came back again in 2017. The bill (SB744/HB1150) was innocuously captioned as the Insurance Costs Reduction Act. It sought to establish a system managed by the Department of Health that would investigate and review claims of medical malpractice and would govern how compensation to injured patients is handled.

The bill's sponsors, Williamson County Republicans Senator Jack Johnson and Representative Glen Casada, have described the proposed system as follows: an administrative law judge would serve as the initial gatekeeper to determine whether there is sufficient evidence for the claim to move forward and, if so, the claim would then be reviewed by a review panel. This 11-member panel would be appointed by the governor, lieutenant governor, and the Speaker of the House. It would be comprised of at least three physicians, two patient advocates, one business executive, one hospital administrator, one accountant, and one lawyer. The panel would oversee how compensation is awarded from a pool of funds collected from fees charged to the state's physicians.

The bill was being pushed by a Georgia-based advocacy group called Patients for Fair Compensation, which is working to establish such patient compensation systems in Alabama, Florida, and Georgia, as well. In a November 29, 2016 Nashville Post article, the general counsel for the Tennessee Medical Association noted his opposition to the bill and was quoted as saying "Tennesseans do not want or need an unproven healthcare liability system. Our present system is working well and is fair and transparent. Tennessee has significantly reduced frivolous lawsuits while maintaining accountability for providers who are negligent. Throwing out our current system in favor of an untried and unproven experiment will be costly and cause undue stress on our medical system, both for patients

and providers. And there is no guarantee of cost savings or any other benefits."

By mid-February, this bill had already been sidelined in the House Civil Justice Committee and never re-emerged. Taking these decisions out of the hands of juries would mark a radical departure from what we usually conceive as the right to a jury trial. Nonetheless, this concept is likely one that we'll see again in years to come.

HEALTHCARE LIABILITY, GENERALLY

There were a handful of other bills that were presented that would also have affected healthcare liability lawsuits. One such bill (SB333/HB591) concerned the certificate of good faith requirement. This legislation sought to impose sanctions upon an attorney who files a healthcare liability action in violation of the certificate of good faith requirement. The possible sanctions would have included payment of the defendant's attorney's fees and a referral to the Board of Professional Responsibility. The bill also required, rather than authorized, courts to order a plaintiff who failed to offer any competent expert testimony to produce a copy of any expert's signed written statements that supported the certificate of good faith to both the court and the prevailing defendant. The bill passed out of Senate Judiciary but the house sponsor took the bill off notice after presenting the bill in Civil Justice Subcommittee. The bill was going to fail.

One caption bill (SB328/HB639) that was filed concerned healthcare liability. In the Senate Judiciary Committee, an amendment to the bill was proposed that would have aggregated any award based upon a derivative claim for loss of society, companionship, and consortium with the award for the injury claim under the GTLA, which would cap the aggregate award at \$300,000. When the amended bill came up for a vote in the Senate Judiciary Committee, TTLA President Thomas Greer testified and the bill, as amended, failed on a vote of 4 to 5.

Finally, one piece of proposed legislation (SB892/HB1089) was not intended to have an immediate effect on tort litigation, but sought to assemble a task force comprised of members of the insurance industry and healthcare providers to study creating a no-fault system for healthcare liability. No-fault systems have been adopted in New Zealand, Denmark, and Sweden. These compensation systems involve review panels and more predictable (formulaic?) mechanisms for compensation. Critics of no-fault systems have raised concerns about a decline in the quality of care a physician provides. This bill also died in the House Civil Justice Committee.

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COLLATERAL SOURCE RULE

Probably the one bill that elicited the most interest this year among tort practitioners was the bill on the collateral source rule. This was SB207/HB350, which had been identified by the TTLA as a bill it supported. The bill was filed as a caption bill – a placeholder that would be used to address the collateral source rule – but, no action was taken on it. This issue has garnered a lot of attention in recent years, so it will be one to watch in the next legislative session.

TORT LAW HODGE PODGE

There was one bill before the legislature that sought to make a common sense amendment to the way an award of attorney's fees is handled on motions to dismiss. This legislation (SB637/HB270) would have limited a judge's ability to award attorney's fees to a party that prevails on a motion to dismiss to those occasions when the entirety of the lawsuit is dismissed on a motion to dismiss, as opposed to rulings where just individual claims are dismissed. This bill saw more action than the others discussed in the article, actually passing in the House on a vote of 93-0, but then was effectively tabled for the year in mid-April in the Senate Judiciary Committee.

A different bill addressing attorney's fees sought to repeal a particularly disturbing provision that passed in the 2016 legislative session. This bill (SB0879/HB1355) intended to delete the requirement under Tenn. Code Ann. § 29-20-113 that the court award attorney's fees and costs to a prevailing state and local government employees who were sued in their individual capacities. The legislation enacted in 2016 made it harder to bring suit against government employees, in part, by enacting this attorney's fees provision. The repeal of this provision failed this year, leaving on the books a provision that effectively dissuades such lawsuits.

One bill that did actually pass that merits some attention is SB0160/HB0188 regarding procedures in General Sessions Court. This bill amended Tenn. Code Ann. § 16-15-716 by deleting the language that a lawsuit is commenced in General Sessions "by a civil warrant issued by the clerk," and substituting this language instead: that the lawsuit is commenced "by a civil warrant being filed with the clerk." This change brings General Sessions practice in line with the Rules of Civil Procedure in the sense that a General Sessions action is now "commenced" upon filing.

WORKERS' COMPENSATION

A bill filed by TTLA, SB297/HB666, now P.C. 380, makes changes to help injured employees as they navigate the workers' compensation system. The first section made improvements to utilization review (UR) so that it would not apply to diagnostic procedures ordered in accordance with the treatment guidelines by the authorized treating physician or chiropractor in the first thirty (30) days after the date of injury. The second section addresses problems that arise when the employer provides a panel of doctors to an employee in which all the doctors are in the same practice group. It simply requires that 1 out of 3 panel physicians not be in the same practice group. The third section increases the funeral benefit in death claims from \$7,500 to \$10,000.

CONCLUSION

These issues, as well as others, are important to the legal community and tort law practitioners. Though many of the bills that were concerning at the outset ultimately did not pass, we may very well see them next year. So, while we can breathe a sigh of relief that the 2017 legislative session is over, it is important to keep these issues in mind. As always, do not forget that the Tennessee General Assembly works for you, even when they have left Nashville and head back home after session. Whatever your position, go here, <http://www.capitol.tn.gov/>; find your legislators, begin a relationship with them and make your voice heard.

ABOUT THE AUTHOR

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1. Cari Wade Gervin, "An end to malpractice?" Nashville Post, <http://www.nashvillepost.com/business/nashville-post-magazine/article/20845326/an-end-to-malpractice> (last accessed 2/27/17).

2. The Commonwealth Fund, "Improving Patient Safety and Lowering Malpractice Costs Through "No-Fault" Compensation Systems" <http://www.commonwealthfund.org/publications/international-innovation/jun/improving-patient-safety-and-lowering-malpractice> (last accessed 2/27/17).

