

INITIATIVE FINANCIAL INFORMATION STATEMENT

The Medical Liability Claimant's Compensation Amendment

SUMMARY OF INITIATIVE FINANCIAL INFORMATION STATEMENT

The Medical Liability Claimant's Compensation Amendment entitles claimants in a medical liability case to recover 70 percent of the first \$250,000 in all damages received and 90 percent of all damages in excess of \$250,000 after reasonable and customary costs are deducted and before the claimant's attorneys' fees are deducted.

The Financial Impact Estimating Conference principals have found it difficult to determine the potential financial impact on state and local governments. Terms such as "reasonable and customary costs," "received by the claimant" and "all damages received" versus "all damages" are subject to varying definition and financial impacts.

Generally, when damages are recovered on behalf of a claimant, they are paid to the claimant's attorney. They are then distributed to the various interests with claims on the funds before the remainder is paid to the claimant. Typical claims against these damages include such items as outstanding tax liabilities, Medicaid reimbursements, hospital liens, subrogated insurance claims, litigation costs, and attorneys' fees. It is unclear which of these claims would fit within the definition of reasonable and customary costs.

Based on the information provided through public workshops, arguments before the Florida Supreme Court, and information collected through staff research, the Financial Impact Estimating Conference principals expect that the proposed amendment could have the following outcomes.

- The amendment may make collection of claims more difficult because the claimant will be entitled to a specific percent of the damages. The claimant would still be liable for the valid claims, but would not have to pay them out of the damages unless the claims are considered within the definition of "reasonable and customary costs." If a claimant chooses not to pay the claims, then a separate collection action would be necessary to collect the claim. It is unlikely that all funds owed would be recovered through a collection action.
- If public assistance liens are within the definition of "reasonable and customary costs," then there will not be a financial impact on state and local governments. If public assistance liens are not within the definition of "reasonable and customary costs," then there may be a financial impact on state and local governments based on uncollected liens. The Financial Impact Estimating Conference principals are unable to determine the exact cost to state and local governments as a result of uncollected liens, but the state may face some unrecoverable Medicaid costs.
- The amendment may reduce the number of medical liability cases brought each year. This could result in two distinctly different financial impacts for the state and local governments. The amendment could restrain the growth of physician fee increases as they relate to medical liability, which would benefit state and local governments' insurance plans. However, fewer cases brought each year could result in claimants using more public assistance programs or public hospitals providing more uncompensated care. This would have a negative impact on state and local governments, which cannot be determined.

FINANCIAL IMPACT STATEMENT

The direct financial impact this amendment will have on state and local government revenues and expenditures cannot be determined.

I. SUBSTANTIVE ANALYSIS

A. PROPOSED AMENDMENT:

Ballot Title:

The Medical Liability Claimant's Compensation Amendment

Ballot Summary:

Proposes to amend the State Constitution to provide that an injured claimant who enters into a contingency fee agreement with an attorney in a claim for medical liability is entitled to no less than 70% of the first \$250,000.00 in all damages received by the claimant, and 90% of damages in excess of \$250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This amendment is intended to be self-executing.

1) Amendment of Florida Constitution

Section 1. Article I, Section 26 is created to read "Claimant's right to fair compensation." In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first \$250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of \$250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.

Section 2. This Amendment shall take effect on the day following approval by the voters.

B. EFFECT OF PROPOSED AMENDMENT

Contracts for attorney services for claimants in the personal injury arena, including medical liability cases, are generally structured as contingent fee contracts. Contingent fee contracts provide that the lawyer's compensation will be a percentage of the amount the attorney recovers for the claimant, rather than a fixed amount for the case or a fixed hourly rate. It would be typical for the attorney and client to agree to a fee of 25 percent of the recovery if the case is settled, 33.3 percent of the recovery if the case goes to trial, and 40 percent of the recovery if the case is the subject of an appeal. The contract might call for costs of suit to be deducted before or after the fee is calculated.

Citizens for a Fair Share, Inc. is the sponsor of the proposed constitutional amendment. Citizens for a Fair Share, Inc. is a political action committee formed principally by the Florida Medical Association for the purpose of supporting efforts for tort reform. One of the organization's goals is to cap attorney contingency fees.

The proposed amendment would limit attorneys' fees by creating a minimum percentage that claimants are entitled to receive in medical liability cases involving contingency fees. The amendment would guarantee a minimum portion of a judgment or settlement in a medical liability case to be given to the claimant (70 percent of the first \$250,000 and 90 percent of any sums in excess of \$250,000, less reasonable and customary costs).

II. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

Depending on how "reasonable and customary costs" is interpreted, this amendment could impact state and local governments' claims against the damages received by the claimant. In the present context, the property or property right to which a lien would attach is the proceeds of judgments or settlements for damages recovered in medical liability cases or in the cause of action to recover such damages.

Currently under state law, Medicaid liens take priority over any other liens authorized by state law or contract. A claimant is obligated by federal law to assign Medicaid the right of reimbursement from third-party payers when he receives treatment for which the Agency for Health Care Administration may be obligated to provide medical assistance. A change to the state constitution will not supersede this federal requirement.

Although the majority of states provide by general law for hospital liens, Florida law does not. Instead, there exists in Florida "an uneven miscellaneous collection of hospital liens created by special acts or local ordinances." Eighteen counties have some form of hospital lien by virtue of special (local) act or by county ordinance. While the various provisions are not identical, most give hospital liens a priority over liens for attorneys' fees and other expenses.

The division of damages awarded today in most civil cases, including cases of medical liability, is affected by a patchwork of statute, case law, court rule and contract. Generally, when a lawsuit for damages is successful, the damages recovered on behalf of a claimant are paid to the claimant's attorney whereupon they are distributed to the various interests with claims on the funds before the remainder is paid to the claimant. Typical claims against these damages include such items as outstanding tax liabilities, Medicaid reimbursements, hospital liens, subrogated insurance claims, costs of litigation, and attorneys' fees. It is unclear which of these claims would fit within the definition of reasonable and customary costs.

The effect of this amendment may be to make collection of claims more difficult because the claimant will be entitled to a specific percent of the damages. The claimant would still be liable for the valid claims, but would not have to pay them when the damage award is received unless the claims are considered within the definition of "reasonable and customary costs." If a claimant chooses not to pay the claims, then a separate collection action would be necessary to collect the claim. It is unlikely that all funds owed would be recovered through a collection action.

The collection of the debt may be made more difficult by the Court's interpretation of what the claimant is entitled to receive. The Court may decide that the entitlement to damages prohibits a creditor from collecting the debt from the damages awarded to the claimant. It is unlikely that this scenario would act as a bar to Medicaid liens since state constitutional protections do not affect federal law.

Therefore, if public assistance liens are within the definition of "reasonable and customary costs," then there will not be a financial impact on the state and local governments. However, if public assistance liens are not within the definition of "reasonable and customary costs," then there may be a financial impact on the state and local governments based on uncollected liens. The Financial Impact Estimating Conference principals are unable to determine the exact cost to the state and local

governments as a result of uncollected liens, but the state may face some unrecoverable Medicaid costs.

In a public workshop conducted by the Estimating Conference on June 17, 2004, representatives from several state agencies were present to discuss information they provided in response to a questionnaire distributed by the principals. The Agency for Health Care Administration provided information on Medicaid liens since they began recording them in 1999. However, because collections may be from liens initiated in prior years and settlements may be less than the original liens, it is difficult to determine a specific fiscal impact to the state.

Other state agencies indicated there was no fiscal impact to them. Although representatives from local governments did not attend, several submitted written documents that indicated there would be no fiscal impact or that it could not be determined if there would be a fiscal impact.

If this amendment results in fewer cases and less money is paid out in settlements, then it would follow that increases in medical malpractice insurance rates may be restrained. If this occurs, then physician fees may also be restrained. The physician fee impact on insurance rates should benefit the budgets of state and local governments. This benefit cannot be determined at this time. However, fewer cases brought each year could result in claimants using more public assistance programs or public hospitals providing more uncompensated care. This would have a negative impact on state and local governments, which cannot be determined.