



What is Tort Reform?

An Actuarial Perspective on Medical Professional Liability Reforms

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This is the second in a series of informational fact sheets prepared by the American Academy of Actuaries'¹ Medical Professional Liability Insurance Subcommittee for use by actuaries and the public. Additional fact sheets will follow on a variety of related topics.

Tort reform efforts represent a movement to reduce the volume and associated costs of tort litigation in the judicial system, often through legislation that, among other things, may restrict the legal theories that can be used to support plaintiff claims or cap damage awards (especially with respect to the awarding of non-economic and punitive damages). Advocates argue that such efforts lower insurance and health care costs, while opponents contend that such reforms deny plaintiffs the recovery they deserve for their injuries. Examples of tort reform include: placing caps on non-economic damages, reforming the collateral source rule, limiting attorney contingency fees, specifying statutes of limitations, making apology statements inadmissible; and changing rules relating to forum shopping, joint and several liability, and expert witnesses.²

Tort reform proposals vary significantly from state-to- state, and regardless of the type of reform implemented, it can be difficult to revise loss estimates after such legislation is implemented. For example, while it would seem that non-economic damage caps might reduce claim severity, the opposite could happen if the frequency of less severe or non-meritorious suits declines sharply. Tort reforms can also disrupt projections in the short term, as the number of suits being filed can speed up ahead of the reforms' implementation. Additionally, in many jurisdictions, uncertainty exists about whether the legislation will be in place or whether court decisions will be consistent with legislative intent.

The following are some common terms used in connection with medical malpractice tort reform, and this Subcommittee's description of such proposed tort reforms³:

Non-economic damage caps are established, often statutorily, to impose limitations on the amount of compensatory or punitive damages that can be recovered in a tort action.⁴ In such cases, although a jury may still award non-economic damages in excess of the cap, the defendant is not liable to pay the excess award unless relevant exclusions apply. However, the defendant would still be liable for his or her share of the economic damages.

¹ The American Academy of Actuaries is a 16,000-member professional association whose mission is to serve the public on behalf of the U.S. actuarial profession. The Academy assists public policymakers on all levels by providing leadership, objective expertise, and actuarial advice on risk and financial security issues. The Academy also sets qualification, practice, and professionalism standards for actuaries in the United States.

² *Black's Law Dictionary*, New Pocket Edition, 1996, West Group, Dallas, TX.

³ The authors of this fact sheet are not attorneys and are providing this description for informational and discussion purposes only. This fact sheet is not intended to be relied upon by any party in any proceeding and the reader should consult with an attorney for more information.

⁴ *Id.*

Collateral source rule reforms are designed to alter the application of the collateral source rule, which holds that, if an injured party receives compensation for injuries from a source, such as an insurer, independent of the wrongdoer, such payment should not be deducted from the damages that the tortfeasor would otherwise have to pay.⁵ These reforms would allow for the award due a plaintiff to be offset by amounts paid by other sources.

Reforms limiting *contingency fees* place restrictions on the fees charged for a lawyer's services if the lawsuit is successful or is favorably settled out of court. Contingency fees are usually calculated as a percentage of the client's award.⁶ Plaintiff attorneys typically take cases on a contingency-fee basis. Limitations on contingency fees increase the percentage of the award that goes to the plaintiff.

Tort reforms concerning *statutes of limitation* generally reduce the amount of time allowed to file a lawsuit. Statutes of limitation establish a time limit for bringing civil suit or for prosecuting a crime, based on the date when the claim accrues (usually when the injury occurs). The purpose of such a statute is to require diligent prosecution of known claims, thereby providing greater likelihood of finality and predictability in legal affairs.⁷ The intent is also to resolve claims while evidence is reasonably available. Statutes of limitation are usually adjusted for circumstances in which the patient is a minor or the harm is not discovered until a later date.

Laws making *apology statements inadmissible* in civil proceedings (also known as "I'm sorry" laws) allow a physician to express sympathy or apologize to a patient without concern that such an expression will be used in court as evidence of liability.

Forum shopping reforms establish rules to limit the practice of choosing the most favorable jurisdiction or court in which a claim might be heard. A plaintiff might engage in forum shopping, for example, by filing suit in a jurisdiction with a reputation for higher jury awards if such a jurisdiction is available.⁸

Expert witness reforms are aimed at changing the standards that must be met by a witness qualified by knowledge, skill, experience, training, or education to provide specialized medical opinions about the evidence or a fact issue who testifies in a medical malpractice case.⁹ This may include determining, for example, whether a general practitioner who is not board-certified may testify about procedures that typically require a specialist. Such changes could also include the establishment of a board certification process, whereby physicians are required to qualify to become expert witnesses in their respective fields.

Joint and several liability reforms are established to adjust limits on the ability of plaintiffs to recover damages from any of the defendants, regardless of their individual share of the liability. For example, a jury determines a plaintiff should be awarded \$10 million. The physician is found to be 90 percent at fault and the hospital is found to be 10 percent at fault. Under several liability, the plaintiff could only collect \$1 million from the hospital (10 percent of the \$10 million total award). Under joint and several liability, if the physician doesn't have enough insurance coverage and money to pay the plaintiff, the hospital could be responsible for up to the entire \$10 million award, an amount in excess of the hospital's proportion of the liability, rather than the \$1 million for which it would be liable under several liability.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*