

# Trial lawyers target cap on malpractice

By Christi Parsons at the Chicago Tribune Newspaper

Tribune staff reporter

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Gov. Rod Blagojevich will sign a new law Thursday limiting the amount of money people can collect in lawsuits against doctors and hospitals, while trial lawyers promise to find a malpractice case they can use to challenge the measure.

Blagojevich, himself a lawyer, said he is setting aside his own concerns about limiting malpractice damage awards for victims because physicians and hospital administrators say it will reduce the insurance costs they contend are driving doctors out of the state.

"When you put a cap on damages, you're essentially taking a portion of the decision away from jurors who have to weigh the facts," Blagojevich said in a telephone interview. "That's why I've consistently felt caps were wrong. But I'm going to put my own personal view aside and sign a bill that has a whole lot of other things in it."

Doctors probably won't see reduced premiums right away, however, because insurers say their costs won't go down until the Illinois Supreme Court has upheld the reform measure.

States with caps on damages have "more doctors, more liability insurers and lower liability premiums for physicians," said Harold L. Jensen, chairman of the ISMIE Mutual Insurance Company, sister organization to the state's powerful doctors' lobby. "But these positive results are only felt after the Supreme Courts in these states have upheld the meaningful reforms."

The law will let state regulators reject excessive insurance rate increases and require plaintiffs to present reports from a qualified physician certifying that their complaints merit court review.

But the legal challenge will focus on the cap on so-called non-economic damages, which juries award for things like pain and suffering and disfigurement. Those damages can increase the size of an overall award unpredictably. The new law would cap the amounts that juries may award for such damages to \$500,000 in the case of individual physicians, and \$1 million for hospitals.

The bill was the result of a spring agreement among Blagojevich and fellow Democrats after months of complaints from doctors, businesses and patients, especially those in areas with a shortage of health-care providers. Republicans had been pushing for such a measure for years. The debate reached a fever pitch in last year's Downstate race for the Illinois Supreme Court, in which a former Democratic attorney lost to a Republican candidate backed by business interests from all over the country.

State high court next

Now, the matter likely is headed to the state Supreme Court, which twice has thrown out state laws limiting damages in the last three decades.

In 1976, the high court threw out a \$500,000 cap on all damages in a medical malpractice case, including those for "economic" damages that cover lost wages and the costs of medical care. More recently, the court in 1997 threw out a state law that, among its most prominent provisions, placed a \$500,000 cap on non-economic damages in all tort lawsuits, not just those against doctors.

Authors of the new measure say it is significantly different from the earlier, discarded statutes. It applies only to non-economic damages in medical malpractice cases, making it more narrowly focused.

"The state of Illinois has a legitimate state interest in reducing the costs of and increasing access to health care," said Republican state Sen. Kirk Dillard, a lawyer from Hinsdale and sponsor of the 1995 law. "This legislation has been carefully crafted to be narrowly targeted, to reduce the liability exposure of health-care providers in medical malpractice actions."

Authors of the new law point out that justices have upheld the concept of limiting what victims can get from doctors. In 1986, the court upheld a state law eliminating "punitive" damages in medical malpractice cases.

Defenders of the law can also point to decisions in other states, where many courts have upheld caps on damages.

On the other hand, courts in several states have rejected such laws. And while they might take other state courts' decisions as advice, justices here only have to consider the Illinois constitution and their court's past interpretations of it.

Past decisions key

In the 1976 opinion, the high court struck down the cap because it arbitrarily discriminated against the most seriously injured victims of medical malpractice. In the 1997 opinion, justices said the cap violated the constitutional separation of

powers, because legislators had assumed the judiciary's responsibility of reducing the size of excessive jury awards.

Echoing the logic of the 1976 decision, the court also said the cap violated the state constitution's ban on "special legislation," because it discriminated against plaintiffs with the worst injuries and gave special benefit to those who caused them.

Plaintiffs' lawyers complain that the new measure has the same problems as the old laws.

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Attorneys for victims also contend the legislature can't write a cap-on-damages law that doesn't violate the parts of the Illinois constitution that prohibit the legislature from writing special legislation.

"The idea is that certain groups of people are hurt in particular because of this legislation," said Kevin Conway, a prominent Chicago trial attorney. "Those who have suffered serious disability. Children and non-working women, who don't earn wages. The elderly and the poor. They are not getting equal treatment under this law."

Meanwhile, the court itself has changed since the last time the panel decided the issue. Only two members of the 1997 majority are still on the court.

While there currently are four Democrats and three Republicans sitting as justices, party affiliation doesn't necessarily give reliable clues as to how the court will regard the issue. One of those who went against the tort law last time was one of the court's more conservative Republicans.

As soon as the law goes into effect, opponents will begin looking for a test case. The law covers malpractice that occurs after Thursday but does not affect cases already filed.

Test case sought

The state trial lawyers' group plans to put out an advisory asking members if they have a strong case, but the group's president says most lawyers don't need to be reminded.

"Our clients and our profession are under an unwarranted attack of unprecedented nature," said Keith Hebeisen, president of the Illinois Trial Lawyers Association. "We need to defend it."

Blagojevich wouldn't speculate on the merits of a legal challenge but said he believes the law will do some good.

"I don't think the insurance companies can provide any more excuses to doctors," the governor said. "I don't think they're in any position to blame the lawyers . . . If they don't keep (premiums) down, I'll be happy to lead the doctors in marching on the insurance companies."

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cparsons@tribune.com