

THE PATIENT COMPENSATION ACT OF MICHIGAN (PCA)

Issue

Should the State Bar of Michigan actively oppose the “Patient Compensation Act of Michigan” proposed by the Michigan State Medical Society?

Synopsis

The Michigan Trial Lawyers Association urges the Representative Assembly to oppose the “Patient Compensation Act of Michigan” because it removes the right to counsel in an entire class of cases. The PCA would require patients, who may lack the medical, scientific and legal knowledge necessary to litigate their claims, to prove that an injury was “avoidable,” and that the injury was the direct and proximate result of the physician failing to render a proper alternative care option, or failing to obtain the patient’s informed consent. This would be an essentially impossible burden to satisfy, particularly because the forum in which the patient must litigate his/her claim is comprised mostly of representatives from the medical and insurance communities. The forum is therefore inherently biased. It also lacks basic procedural safeguards necessary to protect the rights of litigants. Moreover, the PCA represents the unprecedented efforts of a special interest group to eliminate the right to counsel for its own financial gain. The State Bar of Michigan should do its part to stop this effort from catching hold, and becoming a trend.

Background

A. The Legislative History of Medical Malpractice in Michigan.

Unlike other areas of Michigan law, the laws affecting medical malpractice victims have undergone two sweeping revisions in the last 20 years. In 1986, the Legislature passed the first medical malpractice tort “reform” initiative which, among other things, imposed certain expert qualification requirements, imposed limitations or “caps” on most types of injuries, and shortened the statute of limitations for most medical malpractice cases. In 1993, at the urging of the medical lobby and the medical malpractice insurance companies, the Legislature further restricted the rights of medical malpractice victims with its passage of another medical malpractice tort “reform” act. In its second round of reforms, the Legislature placed much stricter requirements on expert witness qualifications, required the pre-suit service of a “notice of intent” to file suit stating the factual basis for the claim and the theories of liability, required the filing of an “affidavit of merit” along with the complaint which was authored by an expert whose qualifications satisfy the new expert qualifications criteria, imposed a two-tiered cap system on all cases, including imposition of the lower cap for cases in which malpractice causes death, and other various changes which provided a unilateral benefit to the medical community, and in particular the medical malpractice insurance companies. Since that time, the Michigan appellate courts have further restricted patients’ rights in their interpretation of the 1993 Act. As a result, case filings have been significantly reduced, and insurance company payouts are the lowest in the United States (49/50 or 50/50 depending on which study you look at). At the same time, insurance companies are making windfall profits.

After being granted virtually every change it sought to malpractice laws, the medical lobby now requests the “Patient Compensation Act of Michigan.”

B. What is the “Patient Compensation Act of Michigan”?

The “Patient Compensation Act of Michigan” would completely eliminate the current medical malpractice legal system. The PCA purports to replace the current system with a no-fault system but, in reality, maintains a fault-based requirement which forces the patient, without the

assistance of counsel, discovery or experts, to prove fault before tribunals comprised of the defendant health care facilities, and a board of directors with a majority of its members comprised of representatives from hospitals, physicians, and medical malpractice insurance companies. The PCA includes the following features:

1. There is no right to counsel;
2. There is no right to discovery;
3. There is no right to offer expert testimony;
4. The Michigan Rules of Evidence do not apply;
5. No established rules of procedure apply to ensure the protection of rights;
6. There are no trial court judges;
7. There are no juries;
8. 200 years of common law does not apply;
9. The tribunal before which the patient's claim is adjudged is comprised of the defendant health care facilities, and subsequently a board of directors with a majority of its members comprised of representatives from hospitals, physicians, and medical malpractice insurance companies appointed by the Governor;
10. Despite the purported description of the PCA as implementing a no-fault system of compensation, the PCA requires the patient, without the assistance of counsel, discovery, or expert testimony, to prove by a preponderance of the evidence that the injury was "avoidable," and that the injury was the direct and proximate result of the physician failing to render a proper alternative care option, or failing to obtain the patient's informed consent.
11. The first phase of the claim at which the involvement of counsel is permitted is on appeal from the tribunal to the Michigan Court of Appeals.

Opposition to the Proposal

Michigan State Medical Society.

Fiscal Impact on State Bar of Michigan

None known.

STATE BAR OF MICHIGAN POSITION By vote of the Representative Assembly on September 14, 2006

Should the State Bar of Michigan actively oppose the "Patient Compensation Act of Michigan" proposed by the Michigan State Medical Society?

(a) Yes

or

(b) No