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Tort Reform Hits Kentucky! But – Does “Reform” Mean “Improvement?”

Tort reform may, for example, make it harder for injured people to file a lawsuit, or limit the amount of money they receive for their injuries. In Indiana, for example, the tort reform law caps all damages, including lost wages and the cost of medical treatment, for victims of medical malpractice.

Arguments abound on both sides as to whether or not tort reform is a good idea. In Kentucky, Section 54 of the state constitution provides that: “The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.” In other words, a cap on damages is not allowed. In light of this restriction and for other reasons (some would say, mostly political), Kentucky has not dipped its toes in the tort reform waters – until this year.

Under a new chapter in the Kentucky Revised Code (216C), effective June 29, 2017, medical malpractice plaintiffs in Kentucky must obtain an opinion from a review panel prior to filing their case in court. Here is an overview of these new panels:

- The process begins with a proposed complaint filed with the Cabinet for Health and Family Services. The filing suspends the expiration of the statute of limitations for the potential lawsuit, and it remains tolled until 90 days after the plaintiff receives the opinion from the medical review panel.
- After the complaint is filed, plaintiffs have 60 days to submit their evidence. The evidence in the case may consist of nonprivileged medical records, x-rays, lab tests, excerpts of treatises, depositions of witnesses (including parties), and affidavits. Following receipt of the plaintiff’s evidence, defendants have 45 days to submit their evidence.
- 30 days following the submission of the defendant’s evidence, the medical review panel will express one of the following opinions:

- The evidence supports a finding that the defendant failed to comply with the applicable standard of care, and it was a substantial factor in producing a negative outcome for the patient.
 - The evidence supports a finding that the defendant failed to comply with the applicable standard of care, but the conduct was not a substantial factor in producing a negative outcome for the patient.
 - The evidence does not support a finding that the defendant failed to comply with the applicable standard of care
- The panel consists of one attorney and three medical professionals.
 - Review by the panel can be avoided if the parties all agree, or if the case is already subject to resolution by alternate means, such as arbitration.
 - The parties do have a right to get a court to intervene in the panel process. The court within the jurisdiction of the dispute may entertain motions to compel, motions to quash, motions to limit discovery, and motions for sanctions.

The tort reform step Kentucky has taken is not, in a manner of speaking, a very deep dive. It does not keep the claim from being filed in court and does not limit damages. It does, though, present a hurdle that must be dealt with as part of the litigation process. It is designed to encourage the parties to settle the matter before it goes to a jury, under the notion that, in light of the panel's report, the parties will have a good idea whether the case has merit and the likely outcome if it proceeds to trial. Proponents also hope that it will help reduce costs by preventing the practice of "defensive medicine" (i.e., ordering excessive tests to rule out any other possible diagnosis), and possibly lower the cost of malpractice insurance and attract new providers to Kentucky.

It remains to be seen whether the use of such panels proves to be a valuable tool in the litigation process, as opposed to an ineffective obligation that does little toward achieving the desired goals of tort

reform.

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