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Unnecessary Medical Liability Claims Hurt PA Nursing Home Residents by Taking Much-Needed Dollars Away from Care, Quality of Life

HARRISBURG --- Unnecessary medical malpractice litigation has a direct effect on the quality and cost of care at Pennsylvania's nursing homes, said Dr. Stuart Shapiro, president and CEO of the Pennsylvania Health Care Association (PHCA) and the Center for Assisted Living Management (CALM).

“Our profession strives to provide the highest level of care to Pennsylvania’s frailest and sickest residents in nursing homes, but that is becoming increasingly difficult in the face of rising, unnecessary lawsuits,” Dr. Shapiro said in testimony to the House Judiciary Committee, which convened a hearing on medical malpractice legislation.

Dr. Shapiro spoke in favor of S.B. 208 and H.B. 1804, known as apology legislation, and against several other bills that he said would jeopardize recent, significant gains in the delivery of quality care to the elderly.

“Long-term care is already chronically-underfunded. People understand the costs associated with complex medical needs, staff salaries and employee benefits, and utility bills, but they fail to grasp the very real and significant economic burden that unnecessary liability claims have on the profession,” Dr. Shapiro said. “The money spent on superfluous legal costs could be so much better spent providing care and quality of life for our residents.”

AON, a global insurance provider, prepared a detailed analysis that showed the number of claims filed has quadrupled from four claims per 1,000 occupied beds in 1997 to 16 claims per 1,000 occupied beds in 2007, even as the quality of care continues to improve. In Pennsylvania, the loss costs per occupied bed (defined as the annual amount per occupied bed expected to be paid to defend, settle and/or litigate claims) increased at an annual trend rate of approximately 17 percent, from a low of \$210 in 1997 to a high in 2007 of \$1,340.

The losses only worsen chronic underfunding in long-term care. The gap between the cost of care and state reimbursements has grown dramatically over the last six years. Currently, nursing homes are under-reimbursed an average of \$14 a day --- or \$5,000 a year --- for each Medicaid resident. Two of every three nursing home residents rely on Medicaid for their daily living needs.

Contrary to increases in loss costs, state Department of Health data show that the quality of care has been steadily improving. The number of provisional licenses dropped more than 50 percent from 2005 to 2007, and the total number of incident reports is down more than 25 percent from 2006 to 2007. Of the total amount of complaints received, less than one-third were substantiated.

However, this hasn't stopped one national plaintiff's firm from targeting nursing homes and other health-care providers in Pennsylvania with voluminous document requests and depositions, all of which increase the day-to-day costs and stress of doing business, both in human capital and dollars.

"We have to do something to reverse this trend," said Dr. Shapiro, who noted that AON's report shows liability costs for nursing homes dropping in states such as Florida, Georgia, Louisiana, Mississippi, Ohio, Texas and West Virginia, where tort reforms recently were enacted.

One such provision that could help Pennsylvania is "apology" legislation, which enables health-care professionals to acknowledge mistakes or adverse outcomes without fear of retribution.

PHCA supports legislation introduced by Sen. Pat Vance (S.B. 208) and mirrored by Rep. Dan Frankel (H.B. 1804). The measures do not relieve the doctor or hospital of liability; they simply allow the doctor or employee to communicate openly and honestly with patients and their families without fear that their statements will be used against them.

In the 35 states, including neighboring Ohio, Delaware and Maryland that have passed apology legislation, the number of claims has gone down and customer service ratings have skyrocketed. Even without a law in place, some commonwealth outfits have experienced similar outcomes. The Central Pennsylvania Physicians Risk Retention Group, representing 1,200 health-care professionals, has seen premiums drop to 35 percent below market rates due to adoption of this innovative policy.

"Apology legislation is a commonsense approach that benefits both consumers and providers and has no impact on the commonwealth's budget," Dr. Shapiro said. "It has proven effective."

Shapiro also expressed strong opposition to H.B. 2123 and S.B. 907, which would invalidate voluntary arbitration agreements that were signed prior to a medical claim. Under these agreements between patients and providers, arbitration – rather than the courts – is used to decide certain issues or disputes.

"These bills represent a real departure from nearly a century of national and state policy direction favoring the use of arbitration in America's business community," Dr. Shapiro said. "Beyond that, these bills represent an even more radical departure because they single out one group --- health care providers --- for disparate treatment under the law."

Dr. Shapiro said the policy reasons justifying the proposed changes are based on misconceptions about the content, fairness and use of arbitration agreements. For example, arbitration agreements are entirely voluntary and not required as a condition of admission or continued stay in a nursing home. Consumers typically have 30 days to rescind their agreement after signing. Most agreements even require the facility to pay for proceedings.

“These agreements contribute greatly to reducing provider litigation costs, which enables us to dedicate a higher percentage of funding --- public and private --- for care, where it should be targeted in the first place,” Dr. Shapiro said.

Dr. Shapiro said PHCA opposes three other bills currently being reviewed by the General Assembly. They include:

- H.B. 1095 and H.B. 2202, which would expand the types of recoverable damages and the list of people who could sue to recover them. The bills would significantly increase liability insurance costs in Pennsylvania and generate more unnecessary lawsuits.
- H.B. 1444 would permit a jury to hear closing arguments on the amount of damages, both economic and non-economic, in civil cases. This change in current law will increase the cost of litigation and damages by appealing to the emotional aspects of a jury.

“These bills will increase the cost of litigation and the amount of damages that hospitals, physicians, nursing homes, businesses, government entities and individuals have to pay in liability cases,” Dr. Shapiro said. “In other words, they will drive up health-care costs for all tax-paying citizens while doing absolutely nothing to ensure higher health care quality.”

PHCA/CALM is a statewide advocacy organization for Pennsylvania’s most vulnerable older residents and their providers of care. Members comprise for-profit, nonprofit and government providers. PHCA/CALM represents more than 334 long-term care and senior service providers that care for almost 33,200 elderly and disabled individuals. For more information call 717-221-1800 or visit www.phca.org.

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