

MSV AND VTLA ACHIEVE Malpractice Cap Agreement

Background

- The Medical Society of Virginia (MSV) participated in discussions about the medical malpractice cap at the direction of General Assembly leadership who charged the relevant stakeholders (MSV, the Virginia Trial Lawyers Association (VTLA) and the Virginia Hospital and Healthcare Association (VHHA)) with developing a long-term solution to the cap. The medical malpractice cap matured to \$2 million on July 1, 2008.
- Following two years of negotiations, MSV and VTLA have reached an agreement which serves to maintain an aggregate medical malpractice cap for the next 20 years.
- This crucial agreement ensures a fair and reasonable medical tort system in Virginia for malpractice judgments or settlements for years to come and preserves access to top quality health care for Virginia's citizens.

The agreement

- The agreement between MSV and VTLA provides for a modest \$50,000 annual increase to Virginia's current \$2 million cap – representing an average annual increase of roughly two percent – beginning July 1, 2012 through June 30, 2032.
- This agreement satisfies key requirements affirmed by the MSV board of directors:
 - Retains Virginia's total cap;
 - Establishes an agreement for a long period of time;
 - Minimizes the risk of large premium increases; and
 - Delays the effective date of any increases.
- Overall, the agreement is expected to help strengthen the long-term predictability and stability of medical liability insurance while having a nominal effect on insurance premiums.
- The agreement preserves potential avenues for further tort reform beyond the medical malpractice cap.

What was at risk in stakeholder talks?

- Having a cap on medical malpractice awards has effectively stabilized medical liability premiums, and retained and attracted new insurers to the state, helping keep physicians in Virginia. It protects the health, safety and welfare of patients by ensuring the availability of health care providers and the adequacy of access to health services in Virginia.
- Not achieving an agreement would have come with risk to physicians and their patients given the following:
 - History has shown that repeatedly saying no to an increase in the cap has resulted in significant lump sum increases being passed by the General Assembly – like the \$500,000 increase passed in 1999, which translated into substantial premium increases for physicians and resulted in reduced access to care for patients.
 - Gov. McDonnell's support for the medical malpractice cap helped put MSV in a position of strength from which to negotiate.
 - All indications during the negotiations were that this favorable agreement would not be available beyond the 2011 General Assembly session.

What's next?

- MSV and VTLA are in the process of informing legislators and the governor about this agreement.
- Legislation codifying the agreement will be introduced during the 2011 General Assembly session.

For more information visit www.msv.org/medmalcap.

What does the cap agreement mean for Virginia's physicians?

Q: What does the agreement between the MSV and the VTLA entail?

A: Today, Virginia's total cap on medical malpractice damages is \$2 million. Under the agreement, on July 1, 2012, the cap will increase by \$50,000 each year for 20 years until June 30, 2032. There will be no legislative efforts by MSV or VTLA to eliminate the total cap, amend the cap to apply only to non-economic (pain and suffering) damages, or create a second cap within the total cap.

There is no prohibition or restriction on either association from pursuing legislation on other tort reforms, such as early disclosure programs.

Q: Won't the agreed upon increase in the cap lead to higher professional medical liability insurance premiums for physicians and affect access to care?

A: This agreement preserves patients' access to care for years to come by establishing long-term stability and predictability in Virginia's medical liability marketplace.

It is expected to have a nominal impact on professional medical liability insurance premiums. Actuarial analysis contracted by MSV indicates that an annual increase in the cap of \$50,000 would result in projected annual premium increases of 0.3 to 0.4 percent. Feedback from major professional medical liability insurance carriers is consistent with this analysis, with some even speculating that there may well be no increases attributable to the cap in the first few years of the agreement.

Q: Now that there is an agreement, will MSV continue to work on medical liability reform?

A: As the agreement between MSV and VTLA preserves potential avenues for tort reform, MSV's Medical Liability Advisory Group will continue to explore opportunities for effective medical liability reform, such as the pilot programs included within the Patient Protection and Affordable Care Act.

Q: Why isn't the Virginia Hospital and Healthcare Association (VHHA) part of the agreement?

A: Although the stakeholder group was established to solely address the medical malpractice cap, ultimately VHHA declined to join the agreement unless a legislative remedy for *Johnson v. Riverside* was included. VHHA has stated that it believes the agreement is reasonable and good for physicians and hospitals.

The framework for the stakeholder discussions provided for two separate and distinct issues: the cap and *Johnson v. Riverside*. An effort to merge the two issues would have thwarted the agreement on the cap, according to stakeholder discussions.

Q: What is *Johnson v. Riverside*?

A: In *Johnson v. Riverside*, the Virginia Supreme Court concluded that incident reports and other documents that contain only factual information about an incident are not privileged and, therefore, can be admitted as evidence at trial. Previously, many circuit courts in Virginia agreed that plaintiffs' attorneys could not discover and admit hospital incident reports at trial because they were privileged quality assurance documents.

Since Dec. 2008, MSV has been a partner in facilitated discussions on *Johnson v. Riverside*, along with VHHA and VTLA, separate from discussions regarding the cap. MSV wants to find a solution that strikes a balance between the legitimate need of patients to have access to certain information and the need for providers to protect information in a way that will lead to improved quality and safety by allowing for free and open exchange of information between providers. It is essential to the productive resumption of these talks that credible and sufficient evidence of any damage caused by the *Riverside* decision be obtained. MSV recently reiterated its commitment to continuing these discussions in the established forum.