



House Bill 1037

Conforming the MCARE Limits on Punitive Damages to Long Term Care

Advancing quality. Improving lives.

Current Pennsylvania law (MCARE) has limited punitive damages to two times compensatory damages for physicians for 15 years. This legislation would simply apply limits (250%) to long-term care providers.

- **The Pennsylvania Health Care Association (PHCA) strongly supports House Bill 1037, which limits punitive damages to 250% of the amount of compensatory damages for long-term care providers. Skilled nursing facilities, personal care homes and assisted living residences would be protected from out-of-state predatory lawyers in the way that physicians have been for 15 years.**
- This legislation does not limit compensatory damages nor does it change the definition of punitive damages in the MCare law in effect for physicians since 2002.
- Prior to the punitive damages protections enacted for physicians (MCARE, 2002), physicians had been facing large numbers of frivolous lawsuits and most cases were settled for fear of unpredictable jury verdicts on punitive damages. Many doctors felt blackmailed by lawyers into settlements, and many physicians were fleeing Pennsylvania. Once the limits on punitive damages (but not on compensatory damages) were enacted, lawyers stopped filing frivolous lawsuits, the number of suits fell dramatically and physicians felt comfortable fighting cases and allowing them to be decided on the merits. The physician flight stopped almost overnight and insurance rates stabilized.
- In Pennsylvania, physicians now litigate 80% of malpractice cases because they believe the case will be judged fairly on the merits, and they have considerable protection from unpredictable punitive damage awards by runaway juries.
- Skilled nursing facilities, on the other hand, currently settle virtually 100% of their cases for fear of punitive damage awards, and one national skilled nursing facility chain has sold its more than 20 facilities and fled Pennsylvania. Today, Pennsylvania is ranked second among all 50 states in total medical malpractice payouts and third in payouts per capita. **In 2014, 95 percent of the payouts were settlements, not judgments...**driven by fear of punitive damages.
- These cases have been driven primarily by predatory out-of-state lawyers who advertise heavily in newspapers throughout Pennsylvania, trolling for plaintiffs. Since 2011, their advertisements have appeared more than 150 times in Pennsylvania newspapers with **37 full page advertisements attacking 62 nursing facilities since January 1, 2016**. The ads have brought public mistrust and anger against an industry that cares for the frail elderly of our commonwealth, and made hard-working staff embarrassed to go to their local grocery store.
- **Liability costs continue to rise for Pennsylvania skilled nursing facilities.** According to a new actuarial analysis on liability costs, the liability cost per Medicaid day in Pennsylvania is \$5.39. Given that Medicaid paid for about 19.35 million days of care in 2015, more than \$104 million of Pennsylvania Medicaid dollars was spent on liability related costs in 2015, much of this in contingency fees to out-of-state predatory lawyers. **This is an increase of more than \$9 million over previous expenditures.** Most of the \$104 million could have been used to improve the quality of care and the quality of life for skilled nursing facility residents.

Questions: For questions about this fact sheet or other questions about long-term care in Pennsylvania, contact Zach Shamberg, PHCA Director of Advocacy and Legislative Affairs at zshamberg@phca.org or 717-221-7934.

- Medicaid currently pays skilled nursing facilities approximately \$27.25 per day per bed less than the actual cost of care, and the costs to defend and settle frivolous cases compounds the problem of inadequate resources to provide care.
- While punitive damage awards are infrequent, they are routinely asked for today in civil lawsuits. The difficulty of predicting whether punitive damages will be awarded by a jury, and the trend toward astronomically large amounts when they are awarded, have seriously distorted settlement and litigation processes. Skilled nursing facilities are settling cases simply to eliminate any long term financial risk.
- The high costs of defending inappropriate and unnecessary liability claims add to the financial pressures on each Pennsylvania skilled nursing facility, and they continue to increase, according to the findings of an analysis released recently by Aon Global Risk Consulting in November 2015.
- Over the past year, **Pennsylvania’s skilled nursing facilities have seen the long-term care loss rate grow by 5.5 percent, due to a 3 percent annual increase in the number of claims.** The projected Pennsylvania 2016 loss rate, which is a combination of the severity and frequency of claims, is expected to increase from \$1,810 in 2014 to \$2,020 per occupied bed. This means that a skilled nursing facility with 100 occupied beds can expect approximately \$202,000 in liability expenses in 2016.
- Despite these funding pressures and the current legal environment, these lawsuits contradict trends in quality as Pennsylvania’s skilled nursing facilities continue to exceed major milestones in quality. From the first quarter of 2014 to the first quarter of 2015, Pennsylvania skilled nursing facilities improved on 10 of 11 quality measures, according to the U.S. Centers for Medicare & Medicaid Services’ five-star rating system, and now rank better than the national average on 8 of the 11 measures.
- **A comprehensive report in the *New England Journal of Medicine* (2011)ⁱ on the relationship between the quality of care in U.S. skilled nursing facilities and lawsuits brought against skilled nursing facilities over an eight-year period concluded that high quality skilled nursing facilities were sued at essentially the same rate as lower performing skilled nursing facilities.**
- The researchers added that lawsuits, or the threat of lawsuits, don’t lead to improvements in care, and that superior skilled nursing facilities are not rewarded for superior care in terms of fewer lawsuits. Rather, the report illustrated the need for medical liability reforms, since lawsuits add to taxpayers’ cost of caring for the frail and elderly and diminish resources that would be better spent on care.
- Punitive damage reform is crucial for Pennsylvania’s long-term care providers in order to continue to provide quality care to our most vulnerable citizens. Excessive litigation and damage awards result in higher consumer prices and decreased availability of services. The high legal costs paid by Pennsylvania health care providers, employers and governments inhibit job growth, increase health care costs and limit access to medical care.
- Enacting limits for long term care providers as currently exist for physicians will help to reduce frivolous litigation and shift resources back to patient care where they should be spent, which is why **PHCA strongly supports conforming punitive damage limits for long term care providers.**

ⁱ New England Journal of Medicine, Relationship between Quality of Care and Negligence Litigation in Nursing Homes, March 31, 2011