Ohio Legislative Service Commission

Bill Analysis

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Sub. H.B. 276

130th General Assembly
(As Passed by the House)

Reps. Stautberg, Becker, Blair, Blessing, Hackett, Hottinger, Johnson, Scherer, Sears, Smith, Buchy, Butler, Green, Maag, Pelanda, Batchelder

BILL SUMMARY

- Provides that a health care provider's, employee's, or representative's statements or affirmations expressing *error or fault* made to the victim of an unanticipated outcome of medical care or the victim's relative or representative that relate to the victim's suffering, injury, or death are not admissible as evidence of an admission of liability or an admission against interest in a civil action brought by the victim or in an arbitration proceeding.

- Provides that a health care provider's, employee's, or representative's communications made to the victim or the victim's relative, acquaintance, or representative following an unanticipated outcome of medical care and made as part of a review in good faith by the provider, employee, or representative into the cause of or reasons for the unanticipated outcome generally are inadmissible as evidence.

- Provides that any guideline, regulation, or other standard under the "Patient Protection and Affordable Care Act" or the "Social Security Act" dealing with Medicare and Medicaid cannot be construed to establish the standard of care owed by a health care provider to a patient and is not admissible as evidence for or against any party in a medical claim or a civil or administrative action involving the licensing of the provider.

- Provides that any insurer's reimbursement policies or determination or regulations of the United States Centers for Medicare and Medicaid Services or the Ohio Department of Medicaid regarding the health care services provided to a patient are not admissible as evidence for or against any party in a medical claim and may not be used to establish a standard of care or breach of that standard of care.

CONTENT AND OPERATION

Medical malpractice

Defendant's expression of error or fault or other communications

The bill modifies current law by providing that in any civil action brought by an alleged victim of an "unanticipated outcome" of medical care or in any arbitration proceeding related to such a civil action, any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, *error, fault,* or a general sense of benevolence that are made by a health care provider, an employee of a health care provider, *or a "representative of a health care provider"* to the alleged victim, a relative of the alleged victim, or a "representative of the alleged victim," and that relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care are inadmissible as evidence of an admission of liability or as evidence of an admission against interest (new language is italicized).[1] (See "**Medical malpractice – Definitions**.")

The bill provides that in any civil action brought by an alleged victim of an unanticipated outcome of medical care, in any arbitration proceeding related to such a civil action, or in any other civil proceeding, any communications made by a health care provider or the provider's employee or representative to the alleged victim or the victim's relative, acquaintance, or representative following an unanticipated outcome and made as part of a "review" (see "**Medical malpractice – Definitions**") conducted in good faith by the health care provider, employee, or representative into the cause of or reasons for an unanticipated outcome, are inadmissible as evidence unless the communications are recorded in the medical record of the alleged victim. Nothing in this provision requires a review to be conducted.[2]

Definitions

The bill modifies the following definitions in current law:[3]

"Representative *of an alleged victim*" means a legal guardian, attorney, person designated to make decisions on behalf of a patient under a medical power of attorney, or any person recognized in law or custom as a patient's agent.

[1] R.C. 2317.43(A).

[2] R.C. 2317.43(B).

[3] R.C. 2317.43(C)(3) and (6).

"Unanticipated outcome" means the outcome of a medical treatment or procedure that differs from an expected result *or any outcome that is adverse or not satisfactory to the patient*.

The bill defines the following terms for purposes of its provisions:[4]

"Representative of a health care provider" means an attorney, health care provider, employee of a health care provider, or other person designated by a health care provider or employee to participate in a review conducted by a health care provider or employee.

"Review" means the policy, procedures, and activities undertaken by or at the direction of a health care provider, employee of a health care provider, or person designated by a health care provider or employee with the purpose of determining the cause of or reasons for an unanticipated outcome, and initiated and completed during the first 45 days following the occurrence or discovery of an unanticipated outcome. A review may be extended for a longer period if necessary upon written notice to the patient or a relative or representative of the patient.

Standards in specified federal laws not admissible as evidence in medical claim

The bill provides that any guideline, regulation, or other standard under any provision of the "Patient Protection and Affordable Care Act," or Title XVIII or XIX of the "Social Security Act" (Medicare and Medicaid) cannot be construed to establish the standard of care or duty of care owed by a "health care provider" to a patient in a "medical claim" and is not admissible as evidence for or against any party in any civil action based upon the medical claim or in any civil or administrative action involving the licensing or licensure status of the health care provider.[5] The bill defines "medical claim" as in current law below; and defines "health care provider" as any person or entity against whom a medical claim may be asserted in a civil action.[6]

Insurer's reimbursement policies and determination not admissible as evidence in medical claim

The bill provides that any "insurer's" "reimbursement policies" or "reimbursement determination" or regulations issued by the United States Centers for Medicare and Medicaid Services or the Ohio Department of Medicaid regarding the

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[4] R.C. 2317.43(C)(4) and (5).

[5] R.C. 2317.44(B).

[6] R.C. 2317.44(A).

health care services provided to the patient in any civil action based on a "medical claim" are not admissible as evidence for or against any party in the action and may not be used to establish a standard of care or breach of that standard of care in the action.[7]

Definitions

For purposes of the above provisions, the bill defines the following terms:[8]

"Medical claim" has the same meaning as in current law.

"Health care provider" means any person or entity against whom a medical claim may be asserted in a civil action.

"Insurer" means any public or private entity doing or authorized to do any insurance business in Ohio, and includes a self-insuring employer and the United States Centers for Medicare and Medicaid Services.

"Reimbursement determination" means an insurer's determination of whether the insurer will reimburse a health care provider for health care services and the amount of that reimbursement.

"Reimbursement policies" means an insurer's policies and procedures governing its decisions regarding the reimbursement of a health care provider for health care services, the method of reimbursement, and the data upon which those policies and procedures are based, including data from national research groups and other patient safety data.

Definition of "medical claim" – current law

"Medical claim" means any claim that is asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or residential facility, or against a licensed practical nurse, registered nurse, advanced practice registered nurse, physical therapist, physician assistant, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic, and that arises out of the medical diagnosis, care, or treatment of any person. "Medical claim" includes the following:[9]

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[7] R.C. 2317.45(B).

[8] R.C. 2317.45(A).

[9] R.C. 2305.113, not in the bill.

- Derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person.

- Claims that arise out of the medical diagnosis, care, or treatment of any person and to which either of the following applies: (a) the claim results from acts or omissions in providing medical care, or (b) the claim results from the hiring, training, supervision, retention, or termination of caregivers providing medical diagnosis, care, or treatment.

- Claims that arise out of the medical diagnosis, care, or treatment of any person and that are brought under the grievance procedure for violation of the rights of a resident of a nursing home.

HISTORY

ACTION	DATE
Introduced	09-30-13
Reported, H. Judiciary	05-29-14
Passed House (60-32)	11-20-14

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