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The Patient Protection and Affordable Care Act's Impact on Medical Malpractice

By Michael R. Brooks, Esq. and Alia A. Najjar, M.D., Esq.

Congress enacted the Patient Protection and Affordable Care Act ("ACA") in 2010 to address rising healthcare costs. With the expansive breadth of the ACA, many groups, including, insurers and attorneys, are concerned with potential ramifications of the law. These concerns stem from a belief that the massive increases in patient numbers on an already overburdened healthcare system will ultimately lead to new standards of care to protect any cost-savings resulting from the ACA. The question that only time will answer is whether the standards of care will be lowered or raised as a result of the ACA and how that will impact the medical malpractice field. This article briefly addresses the potential impact of the ACA on current medical malpractice law, as well as examines Nevada's medical malpractice liability framework in context of these potential problems with the ACA.

Insurance for all Americans and the ever-increasing burden on the healthcare system

The ACA mandated that all Americans must enroll in a health insurance plan by March 2014. By April 2014, approximately 7.1 million Americans had enrolled in a health care plan through insurance exchanges nationwide. The concern now is that, to the extent that these are newly insured individuals, they will begin seeking medical treatment. Physicians, hospitals, and medical malpractice insurers are concerned that the volume, coupled with the stasis in the number of doctors, will lead to more errors and thus more medical malpractice lawsuits. To address this issue, the ACA promotes a re-distribution of new doctors into primary care positions, encourages new health care business models that place emphasis on electronic patient records, and encourages Accountable Care Organizations (ACO). In addition, the ACA encourages the use of nurse practitioners and physician's assistants whenever possible. Finally, to gauge performance, Medicare and Medicaid have established payment structures in which physicians and hospitals are graded based on the quality of the care they provide.

Plaintiffs' attorneys agree that the volume of patients will lead to more errors, but are also concerned that the standards of care will be lowered to ensure that the costs of the inevitable increase in lawsuits will not eat up the savings of the ACA. Others, such as physicians and their insurers, are concerned that the grading systems and new business models will create higher and, in some instances, arbitrary standards of care that will unfairly increase liability for health care providers. The reality has not yet confirmed either fear. It appears, at most, that only a portion of the new enrollees are newly insured. As a result, the healthcare system has not seen a swelling of its ranks as was expected with the passage of the ACA. The healthcare system has and will continue to see growth in the patient population due to population changes.

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Accountable Care Organizations and the death of the doctor-patient relationship

While the ACA does not mandate the creation of ACOs, it does encourage hospitals and other healthcare entities to create ACOs. These organizations include a team of physicians, nurses, nurse practitioners, and other health care practitioners who coordinate their efforts to treat patients. An emerging trend among hospitals is the use of hospitalists, which are physicians who specialize in primary care areas of medicine, such as internal medicine and family practice, and spend all of their time "rounding" on patients in hospitals. These physicians are often part of an ACO and do not see patients once they are discharged from the hospital. Critics claim that ACOs and other non-centralized patient care structures reduce or eliminate continuity of care which they claim is important in the treatment process. Critics will pejoratively refer to ACOs as a "black box" medical service provider that lacks the identifiable faces common in traditional health care.

The potential for increased medical malpractice lawsuits that may stem from these non-centralized patient care systems is two-fold. First, patients who like and feel a connection with their doctors are less likely to file a lawsuit against their doctors. ACOs distribute a patient's care among a multitude of providers and patients may not feel a connection to their healthcare provider. This disruption in the traditional patient-doctor relationship may increase the likelihood that a patient who believes he or she received poor treatment will seek legal advice. Second, with more people involved in the treatment of a patient, there is anecdotal evidence of an increased risk for ineffective treatment. Legitimate errors not within the standard of care could potentially lead to an increase in medical malpractice lawsuits.

The ACA guidelines creating a new standard of care

The ACA does not impose new standards of care. However, the ACA encourages efficiency in medical treatment, such as providing financial incentives to use electronic medical records, payment for performance, and payment based upon readmissions. These new "guidelines" imposed by the ACA have also been considered as factors that could change the face of medical malpractice liability claims by potentially changing the very definition and threshold regarding what constitutes the standard of care.

The American Medical Association ("AMA") was so concerned with the perceived creation of new liability risks for health care providers that, in 2011, it drafted model legislation to shield providers from newly created potential medical malpractice claims resulting from the ACA. The model legislation would prevent claimants from using federal or state practice guidelines, quality measures, and reimbursement criteria to establish or define the standard of care without expert testimony. Congress introduced a version of the model legislation in the House of Representatives in 2012 and again in 2013. It has yet to become law. Georgia became the first and only state to enact the model legislation in 2013.

Nevada's medical malpractice liability structure

Nevada's pre-existing medical malpractice laws already offer significant protection to physicians and medical entities by setting the bar high for claimants to even file a medical malpractice claim and making it much less lucrative to would-be claimants. In 2004, many felt that Nevada did not have enough physicians. Many physicians left the state, retired early, or limited the services offered to patients

because they could not afford or could not find medical malpractice insurance. In an effort to retain and attract more physicians to Nevada, the Nevada Legislature enacted a series of medical malpractice limitations, including a cap on non-economic damages to $350,000; a malpractice affidavit with the filing of a complaint; and heightened evidentiary standards. As a result of these restrictive laws, medical malpractice lawsuits dramatically decreased.

Though the standard of care could change due to the ACA guidelines, it is more likely that these changes will be gradual rather than immediate. As regulations governing hospitals and other health care facilities are promulgated to accommodate the ACA changes, the standard of care may shift. For example, the ACA will affect changes in healthcare practice that will make their way into treatises and texts that are relied upon by healthcare professionals. As the changes are reflected, the standards of care will also continue to evolve.

The influence of the ACA is the fact that it ties payment to performance. Specifically, physicians who participate in Medicare agree to comply with the federal government's payment provisions, including those implemented by the ACA. Thus, physicians will be incentivized to revise treatment current standards in order to receive full compensation. This may lead to more efficient and a better quality of care in the short run. It remains to be seen, however, if striving to meet federal guidelines will stifle further innovation. This type of gradual shift is the type of shift that has been occurring for decades, with modern technology improving treatment and outcomes and becoming the gold standard in the treatment of patients. Gradual shifts in standards of treatment are unlikely to cause a significant change in the number of medical malpractice claims filed in Nevada.

Conclusion

The ACA does not directly impose new medical malpractice liability. Nevada, with its strict requirements for medical malpractice lawsuits, is unlikely to notice an immediate impact with regard to the guidelines set forth in the ACA. Over time, the standard of care will shift based upon the financial incentives, such as payment for performance and payment based upon readmissions and hospital acquired illnesses. For the short term, medical malpractice claims will not likely surge, especially in Nevada. **C**

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