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Tort Overhaul: Patient Compensation System Legislation Raises More Questions than Answers

In recent legislative proposals in Florida and Georgia, lawmakers have sought to establish a patient compensation system (PCS) as an alternative to litigation for compensating patients with injuries that could have been avoided under alternative healthcare (referred to as “medical injuries” within the legislation).

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Based on the system used for workers compensation claims in the U.S.—and modeled on similar medical professional liability (MPL) compensation schemes in Denmark, Sweden, Norway, and New Zealand—PCSs have been characterized—somewhat misleadingly—as similar to “no-fault” administrative systems, because they permit compensation irrespective of whether there was alleged negligence on the part of the provider, unlike the current U.S. tort system.

Under these systems, as put forward by the legislative proposals in both states, claims for medical injuries could be filed by patients themselves, or their families, without an attorney. Claimants would then have their cases reviewed, in a hearing, by independent panels of medical experts, comprising doctors, nurses, and healthcare administration professionals. Proponents argue that these hearings would be less contentious than a lawsuit. Since negligence is not the basis for an award of damages, the goal of the panels would (purportedly) be to examine the facts surrounding the claim and decide on compensation if a medical injury has occurred, regardless of whether the standard of care was or was not breached.

Proponents say offering a PCS as an alternative to litigation could lead to faster outcomes with

claims, as it has in New Zealand, which instituted a no-fault system in 1974. According to a 2004 article in the peer-reviewed journal *Health Affairs*, medical claims in New Zealand are resolved within nine months, as opposed to the two to five years that is common in the U.S.

Faster resolution and less involvement by attorneys, advocates say, would ultimately reduce overall costs, while providing access to compensation for more patients. They also argue that this system would benefit claimants with minor injuries, who are frequently excluded under the current system, because their claims generally do not result in the kind of large monetary awards that make taking an MPL case cost-effective for plaintiff attorneys.



Too good to be true?

But can PCSs really provide the many benefits, in cost savings, fairness, greater access, and efficiencies, that their proponents claim?

Despite the fact that they predict a sharp increase in frequency coupled with the same compensation per claim under PCSs as in the current system, advocates argue that such systems will be more cost-effective than litigation in the long run, because they should dramatically lower—not just the defense costs that would otherwise be required for healthcare providers in liability suits—but also the state’s overall cost for “defensive medicine,” estimated by proponents to be approximately \$30 billion annually in Florida.

At the request of a client with an interest in the MPL sector, we took a close look at the PCS legislation that was proposed during the last legislative session in Florida.

What we found is that the proposed law—while admittedly a serious response to genuine deficiencies in the tort system—probably would not, as now written, reduce MPL costs at all, let alone nearly as much as proponents claim. In fact, the proposed law could result in significant cost

increases for physicians and other healthcare providers.

In fact, the proposed law raises more questions than it answers, and there may be unintended consequences, which could lead to both higher costs and a more Byzantine compensation system—one that retains the worst features of both litigation and administrative bureaucracy.

Although Florida’s PCS bill—HB 897—died in committee last May, its proponents say they are determined to introduce it once again, and lobby even more aggressively on its behalf in the next legislative session.

Georgia’s proposed PCS law, SB 141, which is very similar to the Florida bill, has been referred to committee for review, as of this writing.

The PCS—how it might work

Under the proposed PCS scheme (Figure 1), if a patient sustains an injury that is allegedly the result of medical care, the patient or the

patient’s family can file a claim and be assigned a Patient Advocate, who will help the claimant navigate the system.

Initially, the claim is forwarded to a Medical Review Department, which determines quickly whether the claim is genuine, on its face. If the claim meets this standard, it is passed on to an Independent Medical Review Panel, comprising doctors, nurses, hospital administrators, and other healthcare professionals.

This group does the bulk of the work: examining the claim, assessing its merit, interviewing witnesses, and otherwise procuring testimony. If the panel decides the claim merits some level of compensation, it is forwarded to the Compensation Department, which keeps a schedule of preestablished dollar figures for payment, based on the level of harm incurred.

If either patient or provider disputes the end result, either or both can appeal, sending the claim to an Administrative Law Judge. Note that this option to some extent undermines one of the major goals of a PCS—obviating the tort system. But it does provide an additional, independent review of what has transpired so far, ensuring that the procedures of the PCS were followed according to protocol.

If compensation is paid, the claim goes to the Quality Improvement Department, which attempts to find out what went wrong in the underlying event, to assist the medical profession in learning from its mistakes.

With a PCS, there is no such thing as a doctor who “did something wrong,” only that the doctor—or any doctor, for that matter—“could have done it better.” In other words, the burden is on the claimant, not to prove negligence, but rather “avoidability.” Applying this criterion will increase the number of claims compensated, and the associated costs are likely to be considerable as well.

Pros and cons of the proposed PCS

One of the primary objectives of the bill, as stated by the proponents, is to provide injured patients with recourse to fair compensation, without the need for lengthy and costly litigation.

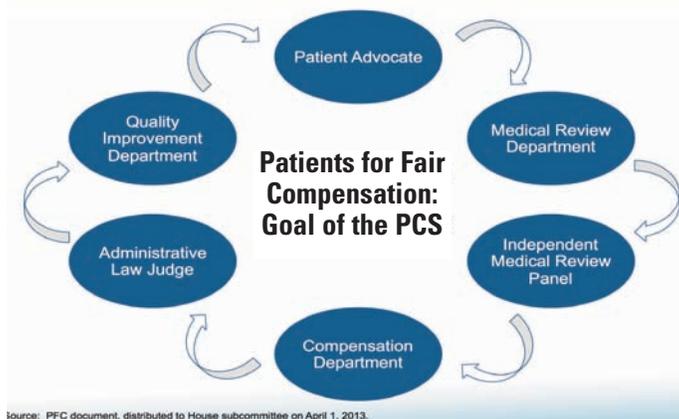
Florida State Representative Jason Brodeur (R-Sanford), who sponsored his state’s PCS bill, said, “This is not a no-fault system, it’s a no-blame system,” adding that it would, “revolutionize the practice of medicine,” by removing a major cost driver in the current system—litigation and the threat of litigation.

But not everyone agrees. The bill may not necessarily provide easier access for everyone who believes they were in some way injured by a healthcare provider. In fact, the system as proposed is complex, and appeals are likely.

Opponents of Florida’s PCS proposal include The Doctors Company (TDC), the largest writer of MPL in Florida, Associated Industries of Florida, and the Florida Chamber of Commerce.

Robert White, head of TDC’s Florida company, has said the PCS approach “to ‘reforming’ the medical malpractice system is a misguided attempt, likely unconstitutional, that would result in an increase in costs, claims against physicians, and fraud—all in the name of curing the symptoms of a ‘sick system’ that appears to be getting healthier.”

Figure 1 How Would It Work?



Rebecca O'Hara, vice president for Government Affairs of the Florida Medical Association (until May 2012), told *Health News Florida* that the proposal had sparked a fierce debate at her organization, with some board members supporting the new system and others opposing it just as vehemently. She had suggested further study.

The only supporters beyond the bill's sponsors, according to *Health News Florida*, were "a few researchers," and the advocacy group that is the main driver of the proposals in Florida and Georgia, and which helped to craft the legislation in both states, Patients for Fair Compensation (PFC).

PFC has spent between \$100,000 and \$190,000 lobbying on behalf of the proposal in Florida, and also funded a study claiming that the PCS would increase the direct costs associated with MPL only moderately, by about \$100 million, as compared with current costs of close to \$800 million.

PFC also claims that implementing the PCS would dramatically lower indirect costs, principally by saving Florida more than \$16 billion a year in defensive medicine costs after three years following its enactment. It is unlikely, given the flaws in the proposed legislation discussed elsewhere in this article, that the PCS would materially impact the practice of defensive medicine.

Issues with the proposed legislation

Our review of HB 897 revealed several important concerns about this bill, not previously part of the public discourse, plus some inconsistencies in the language of the bill itself, that could lead to outcomes that are very different from what the proponents have suggested.

1. "Exclusive remedy" or "alternative to litigation"?

HB 897 states that the proposed PCS would serve as the "exclusive remedy" for personal injury or wrongful death in Florida. However, within the body of the bill itself, the system is called an "alternative" to litigation.

So: will the proposed PCS be an option, or a requirement? The most recent version of the bill states that a provider can choose whether or not to participate in the PCS, and that patients, for their part, have the option to resort to litigation if the PCS process is not to their liking or does not provide the restitution they seek. That argues that Florida's PCS will be merely an option for claimants and providers—one that need not be taken. With this degree of ambiguity in the system, the legislation cannot be expected to lessen costs, only increase them—perhaps significantly.

2. Reporting to the National Practitioner Data Bank (NPDB)

One inadequacy in the legislation, in our view, is its position that com-

penensation made under Florida's PCS will not have to be reported to the NPDB.

The NPDB is an electronic repository of all payments made on behalf of individual health-care providers in connection with MPL settlements or judgments, in addition to adverse actions, via peer review, against licenses, clinical privileges, and professional society memberships of physicians and other

healthcare practitioners.

Under federal law, information on all MPL claim payments must be reported to the NPDB.

The Florida bill asserts that any payment made under a PCS does not constitute a claim and will therefore not have to be reported to the NPDB. However, it is unlikely that the federal government will agree, or allow an exception for any state law, for that matter, so this requirement would undermine the "no-fault/no blame" aspect of the PCS proposal.

3. Compensation schedule

Proponents claim that the tort system and the PCS will have equal costs; in fact, this requirement is built into the proposed legislation.

They also state that claim costs will not change, despite the fact that they assume a sharp increase in frequency, since it will be easier to file a PCS claim than a lawsuit, and also easier to prove avoidability rather than negligence.

However, the PCS will use data on severity from the PIAA Data Sharing Project to develop a compensation schedule.* But PIAA data is collected on a per-claim basis rather than a per-injury basis. We've found that this distinction makes quite a bit of difference.

On average, there are approximately two claims filed per injury. More important, we estimate that there are approximately 10% more paid claims than paid injuries. In short, patients will receive a smaller payment if claim data are used than they would if injury data are applied. Finally, PIAA's published severities are based on physicians' claim data. And physicians have smaller pockets than hospitals.

Although the stated intent of the bill is not to decrease severity (the amount paid for any individual claim) for any particular type of injury, by using PIAA data to establish the dollar amounts for payouts, the proponents of the PCS are, in fact, reducing it.

**Editor's Note: PIAA is opposed to the Patient Compensation System (PCS) proposed by Patients for Fair Compensation (PFC). PIAA has not communicated with PFC and has no plans to support the efforts of this group in any way.*

4. Medical review of applications

The Medical Review Panel procedure would replace the process of "discovery" that is used in the tort system. The bill imposes strict guidelines

for how long each section of the review can take: 10 days are allotted for determining whether a medical injury actually took place; 30 days to determine the “validity” of the claim; and 60 days to complete a “thorough” investigation in the event that the provider opposes the claim.

But is it feasible that a panel like this, made up of busy professionals, could replicate all that happens in discovery—

interviewing witnesses and otherwise procuring testimony, reading thick case files and documents—for each of potentially thousands of injuries—and accomplish all of this within 100 days?

But the Medical Review Panel is indeed charged with this extent of fact gathering, including securing responses from lawyers and medical experts if either side in the case wishes to use them. There’s nothing in the bill stating that the panels need to give lawyers time to present during a hearing, but if lawyers are allowed into the process—as they are in the current bill—not allowing them to present could form the basis for an appeal.

5. Attorney and outside medical expert involvement

Despite the fact that the primary purpose of the PCS is to avoid litigation, the proposed legislation does not prevent either claimants or providers from obtaining legal representation. Since all parties are guaranteed access to records, and since the stakes are going to be just as high as they are with litigation (with similar claim payments mandated), it seems logical that both claimants and providers would want attorneys to peruse those records for them.

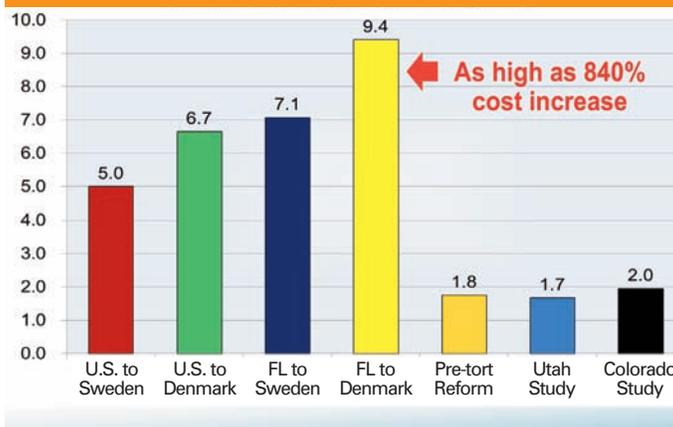
In addition, no precedent as yet exists that would define an avoidability standard, as precedents have been established for negligence. The bill is silent as to whether the disposition of each case will be based on prior cases, or whether references to prior panel rulings will be considered irrelevant.

It seems likely that this unfamiliar and complex system will need to involve a fair amount of time with lawyers and medical experts, and perhaps, at the outset, even more per claim than under the current tort system. If precedent is held to be relevant under the proposed PCS, all parties will have a strong financial interest in arguing their positions on behalf of the first claims heard by the panels, even for claims stemming from less severe injuries.

Will there be savings . . . or costs?

As demonstrated in Figure 2, we compared filed claims for injuries in the U.S. and Florida to what is happening with the PCSs now in place in other countries, based on articles relating U.S. tort law to other systems. These suggest that there could be an increase of as much as 840% in the number of filed claims alone (these estimates consider the practice of filing

Figure 2 Potential Increases in Filed Occurrences
(in Multiples to the Current System)



claims against multiple health-care providers involved in the same occurrence to constitute a single “claim”—this definition corresponds to our understanding that under the PCS a single compensation amount would be paid per occurrence). The associated increase in costs could be substantial, depending largely on the characteristics of filed claims and associated defense costs.

Conclusion

There are many reasons to be critical of the current tort system as a mechanism for determining MPL, but the current PCS scheme—at least, as put forward by legislators in Florida and Georgia—will not address those problems, and could, in fact, make them worse. Exclusivity of the PCS could serve to limit costs, but would possibly raise constitutionality issues with the legislation.

Proponents of these bills are assuming that claimants will not retain legal counsel—that they will just enter the PCS process and take their chances, without any representation. We believe that this assumption is wrong, especially if a PCS decision is appealed.

In other words, with this version of a PCS, claimants are just as likely to find themselves back in court, and practitioners just as likely to keep on playing defense when it comes to prescribing “defensive medicine.” 

For related information, see www.milliman.com.



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