

MCARE Act – More Changes to Come

Pennsylvania's Medical Care Availability and Reduction of Error (MCARE) Act was enacted on March 20, 2002 to address the deteriorating medical malpractice insurance marketplace. The Act includes numerous provisions intended to ensure the availability of affordable medical professional liability insurance. The Act also includes patient safety initiatives intended to promote high-quality health care in Pennsylvania by reducing the incidence of medical errors, which, in turn, should lower the cost of medical malpractice insurance.

While there are many pending proposals to change provisions of the MCARE Act, until legislation is passed, implementation of the Act's mandates continues. Although a number of MCARE tort reform and patient safety provisions became effective over the past year, several of the Act's key provisions will not be implemented until 2004 and beyond. While some of these provisions are expected to result in lower insurance (or self-insurance) costs, others may result in higher costs – at least temporarily – unless other funding sources are made available to address the MCARE Fund's pay-as-you-go liabilities.

Supplemental MCARE Funding

Beginning January 1, 2004 and for a period of 10 years, the MCARE Fund will receive all surcharges collected under the Auto Catastrophic Loss Fund and must use such amounts to reduce MCARE assessments to health care providers. This supplemental funding is expected to bring about \$40 million per year to the MCARE Fund – less than 15% of the current annual funding required to pay MCARE liabilities. Nonetheless, it will bring some relief to health care providers' medical malpractice insurance costs.

MCARE Fund Phase-Out

The CAT Fund (predecessor to the MCARE Fund) initially was established to encourage commercial insurers to enter the Pennsylvania marketplace during the medical malpractice insurance crisis of the mid-1970s. The MCARE Act provides for a two-step phase-out of the Fund. However, this phase-out will occur only if the Insurance Commissioner determines that adequate insurer capacity exists in Pennsylvania.

The first determination must be made in two years (by July 1, 2005). Should the Commissioner determine that there is adequate insurer capacity, starting in 2006, the amount of coverage provided by MCARE will *decrease* from \$500,000 to \$250,000 per occurrence, and the amount of insurance that health care providers must buy (or self-insure) will *increase* from \$500,000 to \$750,000 per occurrence.

Three years after the initial determination (as early as 2008), the Commissioner must make a second determination. If the Commissioner determines that there is adequate insurer capacity, MCARE Fund coverage will be *eliminated* beginning in 2009, and the amount of insurance that health care providers buy (or self-insure) will *increase* from \$750,000 to \$1 million per occurrence.

Logically, insurance premiums should increase to reflect the higher coverage limits for each step of the phase-out. However, it is unlikely that there will be an immediate decrease in the MCARE assessment upon the initial reduction in MCARE coverage, or an immediate elimination of the assessment when the Fund's coverage is reduced to zero. Because the MCARE Fund operates on a pay-as-you-go basis, an MCARE limits decrease in 2006 is not expected to have a significant effect on Fund claim liabilities until 2010. Thus, although the phase-out ultimately will permit health care providers to "shop" their full malpractice coverage limits in the private marketplace, they may experience a period of higher combined insurance/MCARE costs during the phase-out process.

Extinguishment of MCARE Fund "Tail" Coverage

Currently, the MCARE Fund provides first dollar "tail" coverage for both claims payments and defense costs for any claim against a health care provider that is filed more than four years after the incident causing the claim. Under the MCARE Act, the MCARE "tail" coverage will be abolished for all medical malpractice insurance policies issued on or after January 1, 2006 – whether or not the Commissioner determines that there is adequate insurer capacity – and health care providers will then have to insure (or self-insure) these claims.

While premiums charged by insurers are currently high – for both "tail" coverage for claims-made policies and annual premiums for occurrence policies – they logically would be even higher if insurers were obligated to cover those claims currently covered under the MCARE "tail."

Thus, whether or not the first step of the MCARE phase-out begins in 2006, health care providers should expect that the premiums for "tail" and occurrence coverage will increase in 2006 reflect insurers' obligations for claims previously covered exclusively by the MCARE Fund. However, as described above, it may take several years for a corresponding decrease in the MCARE assessment to occur.

Members of Saul Ewing's Insurance Group have extensive experience in working with health care providers and insurers in complying with MCARE Act mandates and can provide more detailed information on MCARE requirements as well as the many proposed changes to the MCARE Act.

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