The Prospect for Malpractice Reform

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Malpractice reform and the treatment of specialty hospitals will be among the more visceral healthcare policy issues addressed in the 109th Congress during 2005. Given the nature of these issues, it is important for healthcare executives to understand the various factors that will weigh in their outcome as well as the potential for change in legislative outlook from 2004. In this column I will discuss the current political environment surrounding federal malpractice reform legislation; in a future column, I will address the fate of specialty hospitals.

Malpractice Reform
During the 108th Congress
During the 108th Congress, the House passed malpractice reform legislation not once, but twice (March 2003 and May 2004)—both times with convincing majorities. And there is no reason to think that the House won’t again pass such legislation in the 109th Congress.

In the Senate, however, while the GOP could show that they had the votes to pass malpractice reform legislation, they did not have enough votes to invoke “ cloture, which would have cut off a threatened filibuster. Several Republican dissidents—Senators Lindsey Graham (SC), Mike Crapo (ID), and Richard Shelby (AL)—and the Independent James Jeffords (VT) joined with the 48 Democrats to prevent three attempts to invoke cloture. In 2003, the Senate GOP fell 1 vote short of the 60 votes needed to begin the floor debate on sweeping malpractice reform legislation. In 2004, they fell 12 and 11 votes short, respectively, to begin floor debate on more narrowly defined medical liability reform legislation—the first targeting relief for obstetricians and gynecologists and the second targeting emergency room and trauma care professionals as well as OB-GYNs.

The bills would have capped noneconomic damages for pain and suffering at $250,000, provided for unlimited economic recoveries, and limited punitive damages to $250,000 or double the amount of economic recoveries (whichever amount was greater). While there were other, less sweeping options, the White House and the GOP were unwilling to make concessions to win Democrats.

Changes in the 109th Congress
What has changed in the Senate between then and now that seems to give supporters of tort reform legislation at least initial optimism? For one thing, there are now four more GOP Senators in Congress. One of these new GOP senators, Senator Richard Burr (NC), replaces the only Democratic senator (Senator Zell Miller) who sided with the Republicans on the malpractice reform legislation—which does not represent a gain for Republicans. What could considerably turn the tide in their favor, however, is that four Democrats are up for reelection in states that were carried by President Bush. As a result, they may be less willing to vote against a top presidential policy initiative for fear that the GOP will make such a vote an issue in their upcoming reelection bid. Finally, it was generally felt by supporters of such tort reform that public opinion was mounting in their favor, as evidenced by moves in numerous state legislatures to limit malpractice damages (somewhat blunted by the passage of only two of the four state ballot initiatives).

But even if all of the above changes produce seven additional votes supporting tort reform legislation (a very unlikely situation) instead of opposing it as in the 108th Congress, the GOP would still be three to four votes short of what is needed to bring the issue to debate. There are still three members of the GOP who have traditionally joined with the Democrats on this issue; there is also the solid block of the remaining 40 Democrats and one Independent arrayed against the measure.

Outlook
There are still other intangible factors that will likely influence the outcome of the vote on medical malpractice—including the will of the new Senate Minority leadership to vigorously fight this legislation when there are more important battles looming, and the cumulative impact of organized medicine’s grassroots advocacy efforts. But unless the Senate GOP acts to somehow shield the tort reform legislation from the reach of the 60-vote rules, including a filibuster, it looks
like the Senate will again be unable to pass sweeping malpractice reform legislation in the 109th Congress.

Another option is compromise. The major point of contention in sweeping legislation is the proposed $250,000 cap on pain and suffering. If the GOP shows some willingness to compromise on the issue, certain Democratic senators—including California’s Dianne Feinstein—may be willing to support the legislation.

One incremental GOP proposal that was supported by many Democratic senators would push more of the malpractice cases out of state courts and into the federal system, which defendants typically prefer because historically it has higher thresholds for bringing suits and smaller damage awards. This proposal, however, was ultimately rejected by Democrats because the GOP was unwilling to consider any amendments.

In addition, the current version of medical malpractice legislation backed by the White House and passed by the House would have prevented consumers from seeking punitive damages from the makers of Vioxx and Celebrex, two popular painkillers recently linked to increased risks of heart attacks and strokes. Obviously this provision has created recent controversy. As a result, it is expected that it will likely be removed from the bill. But for now it is giving opponents of tort reform key arguments against the president’s plan.

Healthcare executives with an interest in malpractice reform should be sure to share their perspectives with elected officials as soon as possible. This issue is likely to be addressed relatively early in the 109th Congress. Communicating with your legislators directly will not only help them better understand the implications of the issue for healthcare organizations, it will also serve to nurture the relationship between you, your organization, and your legislators.

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