Medical Malpractice Venue *Un*-Reform

Beginning in the 1990's, the general proliferation of tort litigation in Pennsylvania focused especially on medical malpractice lawsuits, due in part to the significance and recoverability of damages in those lawsuits.

Over the next decade, the volume of malpractice suits and the size of verdicts in Pennsylvania increased dramatically, practitioners began to depart to practice elsewhere, and most malpractice insurers either stopped writing new policies or were driven into liquidation. Indeed, while dozens of insurers had written policies a decade earlier, only two were left by 2002, and their rates had increased by more than 40%. By 2003, more than 1,600 physicians were participating in the Pennsylvania Joint Underwriter Association, the insurer of last resort.

As the crisis intensified, the media closely covered the departure of physicians from Pennsylvania, especially dramatic consequences like the closure of all maternity wards in already-underserved sections of Philadelphia, and the potential liquidation of the few remaining insurers. Given the twin impacts on the availability of healthcare and malpractice insurance, all three branches of Pennsylvania government, and both political parties, collaborated on a series of sweeping reforms.

The Reform Effort

Beginning in 2002, the Legislature passed and the Governor signed a broad new statute and other measures that sought to increase the threshold of merit necessary to file new malpractice cases and change how those cases are tried. The Supreme Court of Pennsylvania, which enjoys nearly unprecedented rulemaking authority, also promulgated procedural rules designed to ensure that any new filings had sufficient merit.

But the most important and consequential reform was venue reform, which prevented the widespread practice of filing new lawsuits in plaintiff-friendly venues, especially Philadelphia, that had little or no connection to the events giving rise to the suits.

In particular, under Pennsylvania Rule of Civil Procedure 1006, the rule applicable to all civil litigation, plaintiffs could file suit anywhere a defendant could be served or any marginally relevant transaction or event occurred. The courts interpreted Rule 1006 broadly, and it drove civil lawsuits into a handful of counties favored by plaintiffs. To stop what it saw as venue shopping that contributed to the healthcare crisis, the Supreme Court of Pennsylvania promulgated subsection a.1 to Rule 1006, effective January 27, 2003. That subsection required new medical malpractice actions to be filed only in the county where the cause of action arose. The legislature passed a companion statute imposing the same requirement. The results were immediate and sustained. Between 2000 and 2002, the three years before the venue reform was instituted, Pennsylvania averaged 2,733 new medical malpractice lawsuits, 1,541 of which were filed in Philadelphia. Beginning in 2003, filings statewide decreased by nearly half, and filings in Philadelphia decreased by more than two-thirds. Between 2018 and 2020, the most recent three-year period for which statistics are available, an average of 1,204 new suits were filed statewide and 390 new suits were filed in Philadelphia.

Compared to the three-year average before reform, that is a decrease of 44% statewide and 68% in Philadelphia. Equally important, in the wake of reform, large verdicts (defined as verdicts exceeding $1 million) decreased by a remarkable 66% statewide and 85% in Philadelphia. Defense verdicts also increased, although marginally, by 3.3% statewide and 4.4% in Philadelphia. Medical Malpractice Report.

As a result, in the two decades after the reform effort was undertaken, the outflow of practitioners decreased, medical journals and publications reduced their complaints about practicing medicine in Pennsylvania, and the insurance marketplace stabilized and, in some instances, decreased.

To be sure, the reforms did not alleviate all challenges facing the medical community and insurers in Pennsylvania. Malpractice litigation remained vibrant, Philadelphia sustained its reputation for returning large verdicts, physicians have not clamored to practice medicine in Pennsylvania, and a 2020 study found that total malpractice payouts in Pennsylvania, and total payouts per capita, were second only to New York. Yet the urgent bipartisan reforms had their primary intended effect, the availability of healthcare and malpractice insurance stabilized, and the volume of litigation and large verdicts dramatically decreased when compared to the pre-reform era.

The *Un*-Reform

Of all the reforms undertaken in 2002 and 2003, it quickly became apparent that venue reform was the primary target of the plaintiffs' bar. In 2003, for example, they commenced a successful challenge to the Legislature's venue statute, having it declared unconstitutional on the basis that the Supreme Court alone determines venue. That left the Court's procedural rule itself, Rule 1006(a.1), as the only impediment to returning Pennsylvania's venue rules to the pre-reform era. Challenges to the Rule finally succeeded when, by Order dated August 25, 2022, effective January 1, 2023, the Supreme Court amended Rule 1006 by deleting subsection a.1. The effect of this deletion is that any malpractice action filed on or after January 1, 2023 is subject to the lax venue standard in Rule 1006 that applies to all other civil litigation.

Consequences of *Un-Reform*

The deletion of subsection a.1 eliminates the centerpiece of the bipartisan tort reform effort undertaken twenty years ago to address what was, by any fair measure, a severe crisis. The most obvious effect of the reform is that medical malpractice plaintiffs will again have expansive options for the locations of their lawsuits.

It is equally obvious that the litigation will not only increase but will also disproportionately return to venues that plaintiffs view as more favorable. The early evidence is clear. Statistics generated by the Philadelphia court system indicate that filings are already spiking. In January of 2022, there were 18 medical malpractice cases filed in Philadelphia. In January of 2023, there were 70, a four-fold increase. While new filings in 2022 were likely suppressed by the ongoing Covid pandemic, new filings in January of 2017 through January of 2020, before the pandemic began, averaged 35.5. Thus, new filings in January of 2023 essentially doubled over the four-year average before the pandemic. Although anecdotal, the January 2023 filing volume strongly indicates that medical malpractice filings will return to their pre-reform pattern of increased volume and proliferation in Philadelphia. Especially notable is the fact that many new filings in January 2023 were against healthcare providers based outside of Philadelphia who provided care outside Philadelphia. Such filings would have been improper under Rule 1006(a.1).

Thus, the early evidence indicates that medical malpractice litigation in Pennsylvania will return to or approximate its pre-reform volume and verdict potential. This is especially bad timing for healthcare providers because, in 2021, Pennsylvania further loosened Rule 1006's usual venue standard that now applies to medical malpractice cases.

In *Hangey v. Husqvarna Professional Products, Inc.*, 247 A.3d 1136 (Pa. Super. 2021), *alloc. granted*, 278 A.3d 301 (Pa. 2022), Pennsylvania's intermediate appellate court, sitting *en banc*, held that Philadelphia could exercise venue over a product liability case arising wholly outside of Philadelphia because the defendant conducted only .005% of its business, totaling only $75,000, in Philadelphia. Although the case also involved other factors, the extremely low volume of business emphasized by *Hangey* seems to further reduce what was already a loose venue standard. The Supreme Court has agreed to review *Hangey*, and oral argument was held on March 8, 2023, but even a partial affirmance of the intermediate court's decision would further erode the traditional venue standard just as it applies to medical malpractice cases for the first time in twenty years.

The medical community and its allies are certainly considering and in some instances implementing new reform measures, including venue selection provisions in provider agreements. Legislators have also proposed broader structural reforms, including constitutional amendments directed at the Supreme Court's rulemaking authority and even redistricting the appellate courts. But until those and other possible reforms are both implemented and withstand inevitable legal challenges, Pennsylvania's healthcare community will again face a hostile litigation environment that threatens to replicate the availability and insurance crises that the 2002-2003 reform effort successfully, although temporarily, resolved. This is unfortunate news for providers who helped the rest of us navigate the Covid calamity.

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