

SENATE, No. 3343

STATE OF NEW JERSEY
220th LEGISLATURE

INTRODUCED DECEMBER 1, 2022

Sponsored by:

Senator NICHOLAS J. SACCO

District 32 (Bergen and Hudson)

SYNOPSIS

Establishes cap on recovery of compensatory damages and limits contingency fee in medical malpractice cases; permits periodic payment of damages in certain instances; restricts benevolent gesture liability.

CURRENT VERSION OF TEXT

As introduced.



1 AN ACT concerning contingency fees and damages in medical
2 malpractice cases and supplementing Title 2A of the New Jersey
3 Statutes.

4
5 **BE IT ENACTED** by the Senate and General Assembly of the State
6 of New Jersey:

7
8 1. This act shall be known and may be cited as the “New Jersey
9 Medical Malpractice Fees and Civil Damage Act.”

10
11 2. The Legislature finds and declares that establishing an
12 environment in the health care delivery setting that encourages
13 transparency and open communication will protect New Jersey
14 patients and improve health care provider well-being. Imposing
15 reasonable limits on attorney contingency fees in medical
16 malpractice cases while simultaneously establishing predictable
17 raises in maximum limitations on recovery of compensatory
18 damages will add stability in the health care setting.

19
20 3. For the purposes of this act:

21 "Adverse patient safety event or unexpected health care
22 outcome" means any act or omission to act by a health care provider
23 in the rendering of professional services resulting in, alleged to
24 have resulted in, or with the potential to result in injury or death to
25 one or more persons and that is not the result of knowingly or
26 purposefully harmful action, or, shall have the same meaning as in
27 subsection a. section 8 of P.L. 2007, c.196 (C.26:2H-12.25).

28 "Benevolent gestures" means any action that conveys a sense of
29 compassion or commiseration emanating from humane impulses.

30 "Family" means the spouse, domestic partner, parent,
31 grandparent, stepparent, child, guardian, stepchild, grandchild,
32 sibling, half-sibling, adopted children of a parent, a spouse's parent,
33 and in-laws of an injured party.

34 "Future damages" means damages for future medical treatment,
35 care or custody, loss of future earnings, loss of bodily function, or
36 future pain and suffering of the judgment creditor.

37 “Health care facility” means a facility licensed pursuant to
38 P.L.1971, c.136 (C.26:2H-1 et seq.).

39 "Health care provider" means a professional licensed or certified
40 to practice a health care profession pursuant to Title 45 of the
41 Revised Statutes.

42 "Periodic payments" means the payment of money or delivery of
43 other property to the judgment creditor at regular intervals.

44 "Professional negligence" means a negligent act or omission to
45 act by a health care provider in the rendering of professional
46 services, which act or omission is the proximate cause of a personal
47 injury or wrongful death, provided that the services are within the

1 scope of services for which the provider is licensed and which are
2 not within any restriction imposed by the licensing agency or
3 licensed hospital.

4 "Recovered" means the net sum recovered after deducting any
5 disbursements or costs incurred in connection with prosecution or
6 settlement of the claim. Costs of medical care incurred by the
7 plaintiff and the attorney's office overhead costs or charges are not
8 deductible disbursements or costs for this purpose.

9 "Unaffiliated" means a specified health care provider, health care
10 facility, or other entity not affiliated with, or that is not employed
11 by, performing under a contract with, an owner of, or in a joint
12 venture with another specified entity, health care facility, health
13 care provider, organized medical group, professional corporation, or
14 partnership, or that is otherwise not in the same health system with
15 that health care provider, health care facility, or other entity.
16 Whether a health care provider, health care facility, or other entity
17 is unaffiliated is determined at the time of the professional
18 negligence.

19

20 4. a. An attorney shall not contract for or collect a contingency
21 fee for representing any person seeking damages in connection with
22 an action for injury or damage against a health care provider or
23 health care facility based upon the person's or facility's alleged
24 professional negligence in excess of the following limits:

25 (1) 25 percent of the dollar amount recovered if the recovery is
26 pursuant to a settlement agreement and release of all claims
27 executed by all parties thereto prior to a civil complaint or demand
28 for arbitration being filed.

29 (2) 33 percent of the dollar amount recovered if the recovery is
30 pursuant to a settlement, arbitration, or judgment after a civil
31 complaint or demand for arbitration is filed.

32 (3) If an action is tried in the Superior Court or arbitrated, the
33 attorney representing the plaintiff or claimant may file a motion
34 with the court or arbitrator for a contingency fee in excess of the
35 percentage stated in paragraph (2), which motion shall be filed and
36 served on all parties to the action and decided in the court's
37 discretion based on evidence establishing good cause for the higher
38 contingency fee.

39 These limitations shall apply regardless of whether the recovery
40 is by settlement, arbitration, or judgment, or whether the person for
41 whom the recovery is made is a responsible adult, an infant, or an
42 incompetent person.

43 b. If periodic payments are awarded to the plaintiff, the court
44 shall place a total value on these payments based upon the projected
45 life expectancy of the plaintiff and include this amount in
46 computing the total award from which attorney's fees are calculated
47 pursuant to this section.

1 5. a. In any action for injury against a health care provider or
2 health care facility based on professional negligence, the injured
3 plaintiff shall be entitled to recover noneconomic losses to
4 compensate for pain, suffering, inconvenience, physical
5 impairment, disfigurement and other nonpecuniary damage, subject
6 to the limitations in this section.

7 b. In any action for injury that does not involve wrongful death
8 against one or more health care providers or health care facilities
9 based on professional negligence, the following limitations shall
10 apply:

11 (1) Civil liability for damages for noneconomic losses against
12 one or more health care providers, collectively, shall not exceed
13 \$250,000, regardless of the number of health care providers, which
14 does not include any unaffiliated health care providers that are
15 responsible for noneconomic losses pursuant to paragraph (3) of
16 this subsection.

17 (2) Civil liability for damages for noneconomic losses against
18 one or more health care facilities, collectively, shall not exceed
19 \$250,000, regardless of the number of health care facilities, which
20 does not include any unaffiliated health care facilities that are
21 responsible for noneconomic losses pursuant to paragraph (3) of
22 this subsection.

23 (3) Civil liability for damages for noneconomic losses against
24 one or more health care providers or health care facilities that are
25 unaffiliated with a defendant described in paragraph (1) or (2) based
26 on acts of professional negligence separate and independent from
27 the acts of professional negligence of a defendant described in
28 paragraph (1) or (2) and that occurred at, or in relation to medical
29 transport to, a health care facility unaffiliated with a health care
30 facility described in paragraph (2), collectively, shall not exceed
31 \$250,000, regardless of the number of defendants described in this
32 paragraph, which does not include any unaffiliated health care
33 providers or unaffiliated health care facilities that are responsible
34 for noneconomic losses pursuant to paragraph (1) or (2) of this
35 subsection.

36 c. In any action for wrongful death against one or more health
37 care providers or health care facilities based on professional
38 negligence, the following limitations shall apply:

39 (1) Civil liability for damages for noneconomic losses against
40 one or more health care providers, collectively, shall not exceed
41 \$500,000, regardless of the number of health care providers, which
42 does not include any unaffiliated health care providers that are
43 responsible for noneconomic losses pursuant to paragraph (3) of
44 this subsection.

45 (2) Civil liability for damages for noneconomic losses against
46 one or more health care facilities, collectively, shall not exceed
47 \$500,000, regardless of the number of health care facilities, which

1 does not include any unaffiliated health care facilities that are
2 responsible for noneconomic losses pursuant to paragraph (3) of
3 this subsection.

4 (3) Civil liability for damages for noneconomic losses against
5 one or more health care providers or health care facilities that are
6 unaffiliated with a defendant described in paragraph (1) or (2) of
7 this subsection based on acts of professional negligence separate
8 and independent from the acts of professional negligence of a
9 defendant described in paragraph (1) or (2) of this subsection that
10 occurred at, or in relation to medical transport to, a health care
11 facility unaffiliated with a health care facilities described in
12 paragraph (2) of this subsection, collectively, shall not exceed
13 \$500,000, regardless of the number of defendants described in this
14 paragraph, which does not include any unaffiliated health care
15 providers or unaffiliated health care facilities that are responsible
16 for noneconomic losses pursuant to paragraph (1) or (2) of this
17 subsection.

18 d. A health care provider defendant shall not be liable for
19 damages for noneconomic losses in more than one of the categories
20 set forth in this section, regardless of the application or combined
21 application thereof.

22 e. A health care facility defendant shall not be liable for
23 damages for noneconomic losses in more than one of the categories
24 set forth in this section, regardless of the application or combined
25 application thereof.

26 f. The applicable dollar amounts set forth in this section apply
27 regardless of the number of defendant health care providers or
28 health care facilities against whom the claim is asserted or the
29 number of separate causes of action on which the claim is based.
30 For a claim subject to subsection b. of this section the applicable
31 dollar amounts set forth in subsections b., g., and h. provide three
32 separate limits of liability that may apply. For a claim subject to
33 subsection c., the applicable dollar amounts set forth in subsections
34 c., g., and h. provide three separate limits of liability that may
35 apply.

36 g. This section shall be deemed effective as of, and shall apply
37 to all cases filed or arbitrations demanded on or after, January 1,
38 2023. After the effective date of this section, the dollar amounts set
39 forth in subsection b. shall increase by \$40,000 each January 1st for
40 10 years up to \$650,000, and the dollar amounts set forth in
41 subsection c. shall increase each January 1st by \$50,000 for 10
42 years up to \$1,000,000. The dollar amount in effect at the time of
43 judgment, arbitration award, or settlement shall apply to an action,
44 subject to subsection h.

45 h. The applicable amounts for noneconomic damages for
46 personal injury of \$650,000, and for wrongful death of \$1,000,000,
47 as set forth in subsection g. of this section, shall be adjusted for

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1 inflation on January 1st of each year by two percent beginning on
2 January 1, 2034.

3 i. In no action shall the amount of damages for noneconomic
4 losses exceed the applicable dollar amounts set forth in subsections
5 b., c., g., or h. of this section.

6
7 6. a. It is the intent of the Legislature in enacting this section
8 to authorize the entry of judgments in malpractice actions against
9 health care providers which provide for the payment of future
10 damages through periodic payments rather than lump-sum
11 payments. By authorizing periodic payment judgments, it is the
12 further intent of the Legislature that the courts will utilize such
13 judgments to provide compensation sufficient to meet the needs of
14 an injured plaintiff and those persons who are dependent on the
15 plaintiff for whatever period is necessary while eliminating the
16 potential windfall from a lump-sum recovery which was intended to
17 provide for the care of an injured plaintiff over an extended period
18 who then dies shortly after the judgment is paid, leaving the balance
19 of the judgment award to persons and purposes for which it was not
20 intended. It is also the intent of the Legislature that all elements of
21 the periodic payment program be specified with certainty in the
22 judgment ordering such payments and that the judgment not be
23 subject to modification at some future time which might alter the
24 specifications of the original judgment.

25 b. In any action for injury or damages against a provider of
26 health care services, the court shall, at the request of either party,
27 enter a judgment ordering that money damages or its equivalent for
28 future damages of the judgment creditor be paid in whole or in part
29 by periodic payments rather than by a lump-sum payment if the
30 award equals or exceeds \$250,000 in future damages. In entering a
31 judgment ordering the payment of future damages by periodic
32 payments, the court shall make a specific finding as to the dollar
33 amount of periodic payments which will compensate the judgment
34 creditor for these future damages. As a condition to authorizing
35 periodic payments of future damages, the court shall require a
36 judgment debtor who is not adequately insured to post security
37 adequate to assure full payment of the damages awarded by the
38 judgment. Upon termination of periodic payments of future
39 damages, the court shall order the return of this security, or so much
40 as remains, to the judgment debtor.

41 c. (1) The judgment ordering the payment of future damages by
42 periodic payments shall specify the recipient or recipients of the
43 payments, the dollar amount of the payments, the interval between
44 payments, and the number of payments or the period of time over
45 which payments shall be made. The payments shall only be subject
46 to modification in the event of the death of the judgment creditor.

1 (2) In the event that the court finds that the judgment debtor has
2 exhibited a continuing pattern of failing to make the payments, as
3 specified in paragraph (1) of this subsection, the court shall find the
4 judgment debtor in contempt of court and, in addition to the
5 required periodic payments, shall order the judgment debtor to pay
6 the judgment creditor all damages caused by the failure to make the
7 periodic payments, including court costs and attorney's fees.

8 d. Money damages awarded for loss of future earnings shall not
9 be reduced or payments terminated by reason of the death of the
10 judgment creditor, but shall be paid to persons to whom the
11 judgment creditor owed a duty of support, as provided by law,
12 immediately prior to the judgment creditor's death. The court which
13 rendered the original judgment may, upon petition of any party in
14 interest, modify the judgment to award and apportion the unpaid
15 future damages in accordance with this subsection.

16 e. Following the occurrence or expiration of all obligations
17 specified in the periodic payment judgment, any obligation of the
18 judgment debtor to make further payments shall cease and any
19 security given, pursuant to subsection a., shall revert to the
20 judgment debtor.

21
22 7. Statements, writings, or benevolent gestures expressing
23 sympathy, regret, a general sense of benevolence, or suggesting,
24 reflecting, or accepting fault relating to the pain, suffering, or death
25 of a person, or to an adverse patient safety event or unexpected
26 health care outcome, in relation to an act or omission in providing
27 or failing to provide health care, and made to that person or the
28 family or representative of that person prior to the filing of a
29 lawsuit or demand for arbitration, shall be confidential, privileged,
30 protected, not subject to subpoena, discovery, or disclosure, and
31 shall not be used or admitted into evidence in any civil,
32 administrative, regulatory, licensing, or disciplinary board, agency,
33 or body action or proceeding, and shall not be used or admitted in
34 relation to any sanction, penalty, or other liability, as evidence of an
35 admission of liability or for any other purpose, and all such
36 communications, whether verbal, electronic, in writing, or in any
37 other form, also shall be entitled to the privileges and protections
38 set forth in the Evidence Code.

39
40 8. If any provision or part of P.L. , c. (pending before the
41 Legislature as this bill) or the application of any provision or part to
42 any person or circumstances, is for any reason held to be invalid,
43 the remaining provisions and parts, and application of the remaining
44 provisions and parts, shall not be affected, but shall remain in full
45 force and effect, and the provisions and parts of this act are
46 severable.

1 9. This act shall take effect immediately except that section 3
2 shall take effect as of, and shall apply to all cases filed or
3 arbitrations demanded on or after January 1, 2023.

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STATEMENT

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8 This bill would carve out an exception concerning attorney
9 contingent fee arrangements in certain medical malpractice cases,
10 and impose a limit on noneconomic losses in medical malpractice
11 cases not involving a patient death and cases involving wrongful
12 death.

13 This bill would base the amount of an attorney contingency fee
14 that may be contracted for upon whether recovery is pursuant to
15 settlement agreement and release of all claims executed before a
16 civil complaint or demand for arbitration is filed, or pursuant to
17 settlement, arbitration, or judgment after a civil complaint or
18 demand for arbitration is filed, as specified. The percentages are as
19 follows: 25 percent of the dollar amount recovered if the recovery is
20 pursuant to a settlement agreement and release of all claims
21 executed prior to a civil complaint or demand for arbitration is
22 filed; 33percent of the dollar amount recovered if the recovery is
23 pursuant to settlement, arbitration, or judgment after a civil
24 complaint or demand for arbitration is filed and if an action is tried
25 in a civil court or arbitrated, the attorney representing the plaintiff
26 or claimant may file a motion with the court or arbitrator for a
27 contingency fee in excess of these percentages. In the court's
28 discretion a greater amount may be awarded based on evidence
29 establishing good cause for the higher contingency fee.

30 Existing case law provides that in any action against a health
31 care provider based upon professional negligence, the injured
32 plaintiff is entitled to recover noneconomic losses to compensate
33 for pain, suffering, inconvenience, physical impairment,
34 disfigurement, and other nonpecuniary damage. Currently, New
35 Jersey does not have a limit or maximum amount permitted on
36 recovery for noneconomic loss, referred to as compensatory
37 damages. The bill would establish a cap of \$250,000 for actions
38 that do not involve wrongful death. The limitation would be capped
39 at \$500,000 for an action involving a wrongful death. The bill
40 would specify that these limitations would increase by \$40,000 if no
41 wrongful death is involved, and by \$50,000 if wrongful death is
42 involved, each January 1st for 10 years and beginning on January 1,
43 2034, the applicable limitations on noneconomic damages for
44 personal injury and for wrongful death would be adjusted for
45 inflation on January 1st of each year by 2 percent.

46 The bill would permit a judgment ordering that money damages
47 or its equivalent for future damages of the judgment creditor be

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1 paid in whole or in part by periodic payments rather than by a lump-
2 sum payment if the award equals or exceeds \$250,000.

3 This bill would specify that statements, writings, or benevolent
4 gestures expressing sympathy, regret, a general sense of
5 benevolence, or suggesting, reflecting, or accepting fault relating to
6 the pain, suffering, or death of a person, or to an adverse patient
7 safety event or unexpected health care outcome, as specified, are
8 confidential, privileged, protected, not subject to subpoena,
9 discovery, or disclosure, and are not to be used or admitted into
10 evidence in any civil, administrative, regulatory, licensing, or
11 disciplinary board, agency, or body action or proceeding. They also
12 are not to be used or admitted in relation to any sanction, penalty, or
13 other liability, as evidence of an admission of liability or for any
14 other purpose.