

Supplemental Approaches to Medical Professional Liability Reform



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Alternative vs. Supplemental

- Alternative – reforms implemented in lieu of traditional reforms
 - Early Offers
 - Safe Harbors
 - Patient Compensation Systems
 - Health Courts



Alternative vs. Supplemental

- Supplemental – reforms which may be implemented in addition to traditional tort reforms
 - Apology Protections
 - Cooling Off Periods
 - Early Communication (CANDOR)
 - Certificates of Merit
 - Increased Burden of Proof for ER
 - Expert Witness Standards



MPL Environment

- Unprecedented stability for over a decade
- Starting to shift?
 - Claims severity
 - Companies exiting market
 - Surplus
 - Premiums
- Legislation?

Challenges to caps on damages – Judicial Challenges

Courts that have struck down caps on damages

- Alabama, Florida, Georgia, Illinois, Kansas, Missouri, New Hampshire, North Dakota, Oklahoma, Oregon and Washington.

Courts upheld caps on noneconomic damages

- Alaska, California, Colorado, Idaho, Indiana, Kansas, Maryland, Michigan, Minnesota, Missouri, Ohio, Oregon, Texas, Utah, West Virginia and Wisconsin.

Courts upheld caps on total damages

- Indiana, Louisiana, Nebraska, New Mexico and Virginia

Challenges to caps on damages – 2019 Legislative Activity

- Colorado – adjust cap for inflation
- Maryland – increase cap - defeated
- Maine – increase cap
- New Mexico – increase cap – defeated
- Oregon – limits existing cap to wrongful death actions – defeated
- Oregon – Repeal cap - defeated
- OH – adjust cap for inflation



Apology Protections

- Benevolent Communications Inadmissible
 - To patient & family
 - Appropriate healthcare professional
 - Include fault

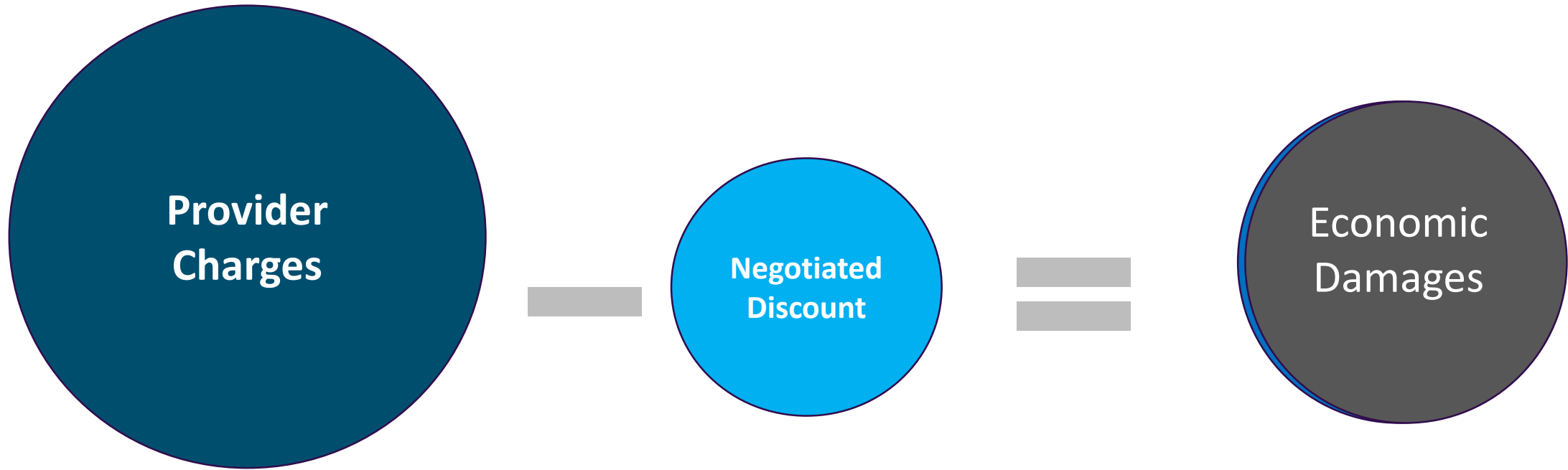
Phantom Damages

To inflate economic damages, plaintiffs' attorneys use billed amounts rather than paid amounts for medical services

Physicians and other health care providers and facilities accept discounted amounts as payment in full

Results in economic windfall for the plaintiff

Phantom Damages: calculating economic damages



Phantom Damages

- Damages recovered for reasonable and necessary health care services or treatment received shall include only:
 - Amounts actually paid by or on behalf of the claimant to the health care providers who rendered reasonable and necessary care, treatment, or services; and
 - Amounts actually necessary to satisfy unpaid charges
 - Amounts for reasonable and necessary future health care services or treatment
- The gross amounts of a claimant's medical bills are inadmissible as evidence of damages where such gross amounts are not reflective of the actual amounts paid or that remain actually owed to satisfy those bills.



Cooling-off Periods

- Pause before litigation
 - Set timeframe
 - Allows for pre-litigation discussions

Affidavit/Certificate of Merit

- Goal to reduce meritless lawsuits
 - Affidavit must state that defendant failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances and that such failure to use such reasonable care directly caused or directly contributed to the cause of the damages.
 - Must be filed within 90 days after a petition is filed.
 - Failure to file will result in dismissal of the care
- Expert
 - Legally qualified health care provider
 - Board certified in same specialty
 - Training and expertise in the disease process or procedure
 - Active medical practice
 - Licensed in the state



Early Communication

- Based on programs at U of MI, U of Illinois-Chicago, etc.
- Newer variants
 - Ascension (CORE)
 - Stanford (PEARL)
 - MedStar
 - Dignity Health
 - Beta Healthcare



Early Communication

- CANDOR
- AHRQ
 - Pilot programs under Obama Administration
 - NY, TX, WA
- National Collaborative for Accountability and Improvement
 - U of Washington



Legislation

- OR, MA, IA, CO
- Proposed – AZ, FL, GA

2019 State activity

- Certificate of merit – **KY**, NJ, NY, OK (ballot initiative), **WV**
 - Volunteer immunity – IL, MS, NJ, **NV**, TX
 - Apology inadmissibility – NJ, NY, UT
 - Collateral source reform – CT, WV
 - Expert witness – IL, MA, NJ, NY, VT
 - Phantom damages – **GA**, FL, MO, WV
- **New AMA model legislation****
- Early Communication & Resolution – AZ, **CO**, FL



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Questions?