

LONG ISLAND BUSINESS NEWS

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As the perennial battle over healthcare tort reform continues, legislation has been introduced that would start the clock ticking on the statute of limitations when an alleged healthcare problem is discovered, rather than when it occurs. Plaintiff attorneys say this is the only fair way to handle a malpractice claim, since many medical problems resulting from neglect only reveal themselves years after an error occurs – sometimes, after the statute of limitations based on when the alleged error occurred has expired.

To that end, several bills have been introduced in the New York State Legislature that would change the rules for filing and handling medical liability cases. But legislation co-sponsored by Assemblywoman Helene Weinstein, D-Brooklyn, and Sen. Thomas Libous, R-Binghamton has generated some particularly heated debates.

Healthcare providers argue that starting the clock at discovery creates an indefinite timeframe to bring claims, resulting in both medical uncertainty and increased liability for providers. Currently in New York, personal injury actions can be brought up to three years after they occur, while medical malpractice claims can be brought for up to 2 1/2 years. But that might not be enough time, according to Stephen Erickson, founding partner of [Pegalis & Erickson in Lake Success](#).

“Sometimes, you just don’t know that there’s a problem until you start developing symptoms,” Erickson said. “If the timeframe has already expired by the time you develop symptoms, that doesn’t seem particularly fair.”

The attorney hypothesized a case where a woman undergoes a mammogram, is cleared and told to return in three years, only to find then that an abnormality was missed and had those years to develop. “You couldn’t bring a lawsuit, because the statute of limitations expired,” Erickson said of the current system. “Here’s a woman who doesn’t even know she has symptoms of breast cancer. Her potential claim is already gone by the time she finds out.”

According to Weinstein and Libous’ legislation, the window would stay open for 10 years after a procedure, allowing far more time than currently allowed. A memorandum accompanying the bill says it would close a “gaping loophole in the law which allows a patient’s rights to expire prior to the patient even knowing that she had any rights in the first place.”

Discouraged providers say this amounts to a carte blanche to bring claims long after incidents may have occurred. “There are important principles behind the statute of limitations,” noted Michael Keane, co-chairman of the litigation department at Great Neck law firm Garfunkel Wild. “In the context of commercial cases, professionals need finality. Business can’t operate if the risks are always floating out there.”

Simply gathering witnesses, preparing testimony and accumulating accurate information years after a procedure could be difficult, Keane added, if not impossible.

“You’re going to have to ask a physician to dig into his memory as to what happened years ago,” he said. “To find his old operating room nurse. The kind of justice that would emerge from this would not be good justice.” Opponents also note that the statute of limitations already can be disregarded in cases where providers cover up errors to prevent patient discovery. “There are more focused ways to address the problem,” Keane said. “The way to address it is not to have an across-the-board rule.” Critics also argue that changing the stature of limitations will ultimately inflate costs for health insurance and healthcare. But medical malpractice claims are routinely estimated at 2 percent or less of a provider’s costs, Erickson noted, and often under 1 percent of a total healthcare budget.

“I don’t see how modifying that is going to have any measurable impact on the total healthcare budget,” Erickson said. “I feel very strongly about that argument that these will raise healthcare costs. There is no correlation. It’s not based on any actual economic data.” “You increase the statute of limitations the way that proposal does and it’s going to be much more expensive,” Keane agreed. “There will be an almost immediate effect on premiums to healthcare providers.”