



ISSUE NUMBER 4

(Proposed by Petition of the People)

Medical-injury lawsuit laws

POPULAR NAME: An amendment to limit attorney contingency fees and non-economic damages in medical lawsuits.

BALLOT TITLE: An amendment to the Arkansas Constitution providing that the practice of contracting for or charging excessive contingency fees in the course of legal representation of any person seeking damages in an action for medical injury against a health-care provider is hereby prohibited; providing that an excessive medical-injury contingency fee is greater than thirty-three and one-third percent (33 1/3%) of the amount recovered; providing that, for the purposes of calculating the amount recovered, the figure that shall be used is the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the medical-injury claim; providing that this limitation shall apply whether the recovery is by settlement, arbitration, or judgment; providing that this limitation shall apply regardless of the age or mental capacity of the plaintiff; providing that the prohibition of excessive medical-injury fees does not apply to workers' compensation cases; providing that the General Assembly may enact legislation which enforces this prohibition, and that it may also enact legislation that determines the relative values of time payments or periodic payments and governs the consequences and penalties for attorneys who contract for or charge excessive medical-injury contingency fees; providing that the General Assembly shall enact a measure which specifies a maximum dollar amount for a non-economic damage award in any action for medical injury against a health-care provider, but that such a measure may never be smaller than two hundred and fifty thousand dollars (\$250,000); providing that the General Assembly may, after such enactment, amend it by a vote of two-thirds of each house, but that no such amendment may reduce the maximum dollar amount for a non-economic damage award in any action for medical injury against any

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***being challenged in court**

QUICK LOOK: What does your vote mean?

FOR: A FOR vote means you are in favor of changing the Arkansas Constitution regarding all of the components proposed, including prohibiting attorneys from charging clients more than one-third of the amount of money received in medical-injury lawsuits and allowing the state legislature to establish a maximum dollar amount that people can receive in medical-injury lawsuits for non-economic damages, as long as the maximum is not less than \$250,000.

AGAINST: An AGAINST vote means you are not in favor of changing the Arkansas Constitution regarding one or more of the components proposed, including prohibiting attorneys from charging clients more than one-third of the amount of money received in medical-injury lawsuits and allowing state legislators to establish a maximum dollar amount that people can receive in medical-injury lawsuits for non-economic damages, as long as the maximum is not less than \$250,000.

The following statements are examples of what supporters and opponents have made public either in media statements, campaign literature, on websites or in interviews with Public Policy Center staff. The University of Arkansas System Division of Agriculture does not endorse or validate these statements.

What do supporters say?

- Caps on non-economic damages can help lower the cost of liability insurance for nursing homes, which can result in lower costs for Medicaid.
- Arkansas ranks as one of the 10 worst states in the country for lawsuits, a problem that impacts all Arkansans and their health care. A higher rate of lawsuits raises health care costs, keeps doctors and specialists from moving to Arkansas, and compels existing ones to leave.
- This amendment, if approved, will help ensure that Arkansans are not taken advantage of by trial lawyers and that patients, doctors, nurses and medical professionals will not be taken advantage of by questionable lawsuits.

What do opponents say?

- It basically would place the value of a life at \$250,000 if there are no economic damages.
- Using dishonest tactics, this amendment effectively takes away the constitutional freedom to have a trial by jury, the one mechanism Arkansans have to hold corporate nursing home owners responsible when they neglect and abuse our elderly citizens.
- It prevents juries from holding medical-care providers accountable for their negligence.

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health-care provider to less than two hundred and fifty thousand dollars (\$250,000); providing that the Supreme Court shall adjust this figure for inflation or deflation on a biennial basis; and providing that this amendment does not supersede or amend the right to trial by jury.

Who is the sponsor of this amendment?

Health Care Access for Arkansans

What is being proposed?

This amendment asks voters to change the Arkansas Constitution. If approved by voters, this amendment would:

1. Amend Section 3 of Amendment 80 to the Arkansas Constitution to allow the state legislature to pass laws regarding attorney compensation and money awarded in medical-injury lawsuits.
2. Prohibit attorneys from collecting as a fee more than 1/3 of the net amount of money a client receives in a medical-injury lawsuit against a health-care professional or health-care business. Anything over this amount would be considered an “excessive contingency fee” under the law.
 - This prohibition would apply regardless of whether the medical-injury lawsuit is resolved without going to court, or a judgement by a judge or a jury.
3. Amend Section 32 of Article 5 of the Arkansas Constitution to require the state legislature to pass laws setting a maximum dollar amount per health-care provider that people can receive in medical-injury lawsuits for “non-economic damages,” or reasons other than lost wages, medical expenses or other expenses incurred as a result of the injury.
 - State legislators would be required to establish in 2017 a maximum dollar amount per health-care provider that people can receive in medical-injury lawsuits for “non-economic damages.” The amount must be at least \$250,000.
4. Define terms such as “action for medical injury,” “health-care provider,” “health-care professional,” “health-care business” and “medical injury,” and allow state senators and representatives to further define those definitions in laws that may be passed in the future.
5. Establish that the changes to the constitution called for in this amendment do not affect the constitutional right to jury trials.
6. Require the Arkansas Supreme Court to routinely review and adjust for inflation the maximum dollar amount that a person can receive in a medical-injury lawsuit for “non-economic damages.” The amount could not go below \$250,000.

What does the constitution say now?

The proposed amendment would alter two sections of the Arkansas Constitution.

Section 3 of Amendment 80 to the Arkansas Constitution currently says:

The Supreme Court shall prescribe the rules of pleading, practice and procedure for all courts; provided these rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as declared in this Constitution.

The proposed change would create an exception in Section 3 of Amendment 80 and give legislators the authority to pass laws prescribing rules and procedures related to medical-injury lawsuits.

Section 32 of Article 5 of the Arkansas Constitution currently says:

The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees, and to whom said payment shall be made. It shall have power to provide the means, methods, and forum for adjudicating claims arising under said laws, and for securing payments of the same. Provided, that otherwise, no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property; and in case of death from such injuries the right of action shall survive, and the General Assembly shall prescribe for whose benefit such action shall be prosecuted.

The proposed change would create an exception to allow laws limiting the amount of non-economic damages that could be recovered for injuries resulting in death or for injuries to people or property.

When was the last time Arkansas voted on this issue?

Voters approved Amendment 80 to the Arkansas Constitution in 2000 by a vote of 431,137 (57.12%) in favor to 323,647 (42.88%) against. This amendment revised the court system in a number of ways, including giving the Arkansas Supreme Court the power to establish court practices and procedures.

Voters amended Section 32 of Article 5 of the state constitution in 1938 by a vote of 77,028 (62.63%) in favor to 45,966 (37.39%) against. Voters gave legislators the power to pass laws establishing the amount of compensation to be paid by employers for injuries to employees.

In 2003, state lawmakers passed the Civil Justice Reform Act to change procedures related to civil lawsuits. The changes



included revisions of rules regarding medical-injury lawsuits. Portions of the law were later found unconstitutional by the Arkansas Supreme Court, leaving the constitutional amendment process as the only way to make changes related to state compensation laws.

What is a contingency fee?

A contingency fee is an amount of money that an attorney receives for payment only if a lawsuit is won. According to the American Bar Association, a lawyer agrees to accept a fixed percentage of the final amount paid to a client. If a client wins, the lawyer's fee comes out of the money awarded to the client. If a client loses, the attorney doesn't receive any money for the work done on the case. This does not mean clients won't have to pay for costs associated with filing the lawsuit.

Lawyers and clients use this arrangement most often in cases involving personal injury or workers' compensation.

Under this proposal, what would be considered an "excessive contingency fee"?

An "excessive contingency fee" would be a payment to an attorney of more than 1/3 the amount of money a client receives in a medical-injury lawsuit, minus costs incurred with prosecution or settlement of the claim. An example of those costs include hiring expert witnesses and court filing fees. The plaintiff's medical care costs and the attorney's office-overhead costs cannot be used to calculate the contingency fees.

Is there a maximum amount that attorneys can charge clients for representing them in a medical-injury lawsuit against a health-care professional or health-care business?

There is no maximum amount of payment established by Arkansas law. The amount people pay for legal representation in Arkansas depends on the contract agreed to by the attorney and client.

What are “non-economic damages?”

The phrase “non-economic damages” is not defined in the amendment. However, in general, the phrase refers to the amount of money paid to compensate a person for the pain and suffering, inconvenience or loss of quality of life that occurs because of an injury. These losses are separate from a person’s lost income or medical care expenses.

How much money could a person collect in non-economic damages under this proposal?

This amendment does not specify the maximum amount a person could collect for non-economic damages. However, it requires the Arkansas legislature to set a maximum amount of non-economic damages of at least \$250,000 per health-care provider.



If passed, the amount that could be collected would depend on who is providing and billing for health-care services. For example, if a doctor is working in a hospital and causes a medical injury, the doctor and hospital could be sued independently as long as each one is both providing and billing for health-care services. However, let’s say a nurse is also involved.

If the nurse is under the employment of the doctor or the hospital, he or she might be providing but not billing for health-care services. Therefore, the nurse’s involvement creates no grounds for a higher-dollar judgement.

This proposal does not address the economic damages a person could receive.

How would the maximum amount of non-economic damages set by the state legislature ever change?

Legislators could change the maximum amount of non-economic damages at a future date with a two-thirds vote

in each house. In addition, the Arkansas Supreme Court would be required to review the amount every two years, starting in 2018, to see if it should change because of inflation or deflation.

The adjustment would be based on the Consumer Price Index or a similar measure chosen by the court. (The Consumer Price Index is a measure of the average change over time in the price paid by people for goods and services.)

What is considered a “medical injury” under this proposal?

The proposed amendment describes “medical injury” as any harm that occurs during the course of receiving professional services from a health-care provider resulting from:

- Negligence, error or omission in the performance of such services
- Services without informed consent or in “breach of warranty” or in violation of contract (“Breach of warranty” refers to the failure of a seller to fulfill the terms of a promise or claim.)
- Failure to diagnose
- Premature abandonment of a patient
- A course of treatment
- Failure to properly maintain equipment or appliances necessary for providing services
- Otherwise arising out of or sustained in the course of such services

Who is considered a health-care provider under this proposed amendment?

The proposed amendment defines a health-care provider as a “health-care professional” or a “health-care business.”

A health-care professional is further defined as an individual providing and billing for health-care services that is licensed by the state or otherwise lawfully providing professional health-care services.

The amendment specifically includes:

- Physician
- Certified registered nurse anesthetist
- Physician’s assistant
- Nurse
- Optometrist
- Chiropractor
- Physical therapist
- Dentist
- Podiatrist
- Pharmacist
- Psychologist
- Veterinarian

A health-care business is also defined in this proposal as an entity providing and billing for health-care services that is licensed by the state or otherwise lawfully providing health-care services.

The amendment specifically includes an owner, officer, employee or agent of a:

- Hospital
- Nursing home
- Community mental health center
- Ambulatory surgical treatment center
- Birthing center
- Intellectual disability institutional rehabilitation center
- Outpatient diagnostic center
- Nonresidential substitution-based treatment center for opiate addiction
- Recuperation center
- Rehabilitation facility
- Hospice
- Clinic
- Home health-care agency

If passed, when would the legislation take effect?

The amendment would go into effect Jan. 1, 2017. This amendment could be altered or repealed only by another citizen initiative.

Where can I find more information?

The complete wording of this proposed amendment can be found at the bottom of an Attorney General's Opinion at <http://ag.arkansas.gov/opinions/docs/2016-038.pdf>.

The following is the proposed constitutional amendment name and title as they will appear on the state's November General Election ballot.

Issue No. 4

(Popular Name)

An Amendment to Limit Attorney Contingency Fees and Non-Economic Damages in Medical Lawsuits

(Ballot Title)

An amendment to the Arkansas constitution providing that the practice of contracting for or charging excessive contingency fees in the course of legal representation of any person seeking damages in an action for medical injury against a health-care provider is hereby prohibited; providing that an excessive medical-injury contingency fee is greater than thirty-three and one-third percent (33 1/3%) of the amount recovered; providing that, for the purposes of calculating the amount recovered, the figure that shall be used is the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the medical-injury claim; providing that this limitation shall apply whether the recovery is by settlement, arbitration, or judgment; providing that this limitation shall apply regardless of the age or mental capacity of the plaintiff; providing that the prohibition of excessive medical-injury fees does not apply to workers' compensation cases; providing that the General Assembly may enact legislation which enforces this prohibition, and that it may also enact legislation that determines the relative values of time payments or periodic payments and governs the consequences and penalties for attorneys who contract for or charge excessive medical-injury contingency fees; providing that the general assembly shall enact a measure which specifies a maximum dollar amount for a non-economic damage award in any action for medical injury against a health-care provider, but that such a measure may never be smaller than two hundred and fifty thousand dollars (\$250,000); providing that the General Assembly may, after such enactment, amend it by a vote of two-thirds of each house, but that no such amendment may reduce the maximum dollar amount for a non-economic damage award in any action for medical injury against any health-care provider to less than two hundred and fifty thousand dollars (\$250,000); providing that the Supreme Court shall adjust this figure for inflation or deflation on a biennial basis; and providing that this amendment does not supersede or amend the right to trial by jury.

FOR

AGAINST